(22,459.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 473.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES M. KYLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 26, 1911.

1 No. 15383.

KYLE
v.
CHICAGO, B. & Q. R. Co.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol in the city of Lincoln, in said State, on the 20th day of September, 1910.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Jesse L. Root, Judge.
Hon. Samuel H. Sedgwick, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 22nd day of August, 1907, there was filed in the office of the clerk of said Supreme Court, a certain transcript in the words and figures following, to-wit:

In the District Court of Merrick County, Nebraska.

Pleas before the District Court of the Sixth Judicial District of Nebraska in and for the County of Merrick, at a term thereof begun and holden in the City of Central City, in said County and State, on the 20th day of May, One Thousand Nine Hundred and seven.

Present:

Hon. James G. Reeder, Judge.
Melvin G. Scudder, Clerk.

2 Be it remembered, that heretofore, to-wit on the 30th day of March, 1907, A. D. a petition was filed in the office of the Clerk of the said court in the words and figures following, to-wit:

In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Petition.

First.

That the defendant is now and was at the time hereinafter mentioned a corporation duly organized under the laws of the state of Iowa and owned and operated a certain railroad running from Palmer, Nebraska, to South Omaha, Nebraska, and was during all of said time operating said railroad as a public carrier of freight in the State of Nebraska, and was during all of said time a common carrier for hire of goods and live stock from Palmer, Nebraska, to South Omaha, Nebraska.

Second.

That on the 6th day of September, 1905, the plaintiff delivered to defendant, and it then received as such public carrier of freight and as such common carrier one hundred head of cattle the property of the plaintiff, which the defendant, in consideration of a reasonable and valuable reward paid it by the plaintiff, agreed to convey and securely upon its said line of railroad within a reasonable time from Palmer, Nebraska, to South Omaha, Nebraska, and to there deliver same to Clay, Robinson, and Company.

Third.

That said cattle were shipped in car-load lots and filed five cars; that they were shipped out of Palmer, Nebraska, at 5.20 P. M.
3 on the 6th day of September, 1905, and did not reach the Stock Yards at South Omaha, Nebraska, where they were to be delivered to Clay, Robinson, and Company, until 12.55 P. M. on the 7th day of September, 1905; that the distance from Palmer, Nebraska, to the Stock Yards at South Omaha, Nebraska, over said line of railroad does not exceed 166 miles; that the entire time consumed by the said train on which said cattle were shipped in picking up and setting out and in loading and unloading stock at stations from the time it left Palmer at 5.20 on the 6th day of September, 1905, until it reached the stock yards at South Omaha, Nebraska, on the 7th day of September, 1905, at 12.55 P. M. did not exceed one hour; that said train should, if run at a reasonable rate of speed and without unnecessary stops and without stops unreasonably prolonged, have reached the stock yards at South Omaha, Nebraska, within ten and one-half hours after it left Palmer, Nebraska; and that the time used by said defendant in conveying said cattle on said train and over said line of railroad was negli-

gently, unnecessarily and unlawfully prolonged for a period of nine hours over the time allowed by law in that behalf and over the time that was reasonably necessary for that purpose.

Fourth.

That by reason of the aforesaid carelessness and negligence of said defendant in failing to transport said cattle from Palmer, Nebraska, to the stock yards at South Omaha, Nebraska, within a reasonable time and within the time allowed by law for that purpose, the plaintiff's damage has been in the sum of $450.00. Wherefore the Plaintiff prays judgment against the defendant for the sum of $450.00 with interest thereon at 7% per annum from the 7th day of September, 1905, and his costs in this action expended.

JAMES M. KYLE,
Plaintiff.
By MARTIN AND AYRES,
His Attorneys.

4 THE STATE OF NEBRASKA,
Merrick County:

James M. Kyle, Plaintiff, being first duly sworn deposes and says, that the facts set forth in the above and foregoing petition are true as he verily believes.

JAMES M. KYLE.

Subscribed in my presence and sworn to before me this 25th, day of March, 1907.

GEORGE W. AYRES,
[SEAL.] *Notary Public.*

My commission expires January, 20th, 1909.

And afterwards on the 27th, day of April, 1907 there was filed or entered of record in the office of the Clerk of the said Court a certain "Answer" which was in the words and figures following, to-wit:

In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Answer.

Now comes the defendant and for answer to the petition filed by the plaintiff says that it is a corporation duly organized under the laws of the State of Iowa, and that as such it operated the line of railroad from Palmer to South Omaha referred to in the plaintiff's petition. Defendant further answering says, that it is informed

and believes that the plaintiff did make a contract in writing with the said railroad Company for the shipment of cattle from the station of Palmer to the station of South Omaha, in Nebraska,
5 at or about the time stated in said petition. And that the said defendant did transport and deliver the said cattle as contracted for without any fault or negligence or delay on its part.

Further answering defendant says that the plaintiff in said contract of shipment agreed to accompany and look after and care for said stock and did accompany the same for that purpose and if any loss or damage was sustained in said shipment, it was the result of the plaintiff's own carelessness and negligence, and without any fault on the part of this defendant.

Further answering defendant denies each and every allegation in said petition contained other and different from herein alleged.

Wherefore defendant prays judgment against plaintiff for costs.

PATTERSON AND PATTERSON,
J. W. DEWEESE, AND
F. E. BISHOP,
Att'ys for Defendant.

STATE OF NEBRASKA,
Lancaster County, ss:

J. W. Deweese, being first duly sworn deposes and says that he is one of the attorneys for the above defendant; that said defendant is a corporation; that he has read the foregoing answer and the facts and statements therein made are true as he verily believes.

J. W. DEWEESE.

Subscribed and sworn to before me this 26th, day of April, 1907.

FRED M. DEWEESE,
Notary Public.

And afterwards on the 15th, day of May, 1907, there was filed or entered of record in the office of the Clerk of the said court a certain "Reply" which was in the words and figures following, to-wit:

6 In the District Court of Merrick County, Nebraska

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Reply.

Comes now the Plaintiff and replying to the answer of the defendant filed in this cause, denies each and every allegation of fact therein contained save and except as such allegations admit the truth of the allegations contained in plaintiff's petition.

JAMES M. KYLE, *Plaintiff,*
By MARTIN AND AYRES, *His Att's.*

THE STATE OF NEBRASKA,
Merrick County:

James M. Kyle, Plaintiff, being duly sworn deposes and says that the allegations of fact contained in the above and foregoing reply are true as he verily believes.

JAMES M. KYLE.

Subscribed and sworn to before me this 11th, day of May, 1907.

W. J. COPELAND,
Justice of the Peace.

And afterwards on the 28th, day of May, 1907 there was filed or entered of record in the office of the Clerk of said Court Certain "Instructions" which were in the words and figures following to-wit:

Instructions.

In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Defendant.

7 Gentlemen of the Jury:

The plaintiff prosecutes this action against the defendant for the purpose of recovering the sum of $450.00 which is claimed as liquidated damages by reason of the delay of the defendant in transporting nine cars of cattle from the Village of Palmer in Merrick County, Nebraska, to South Omaha, Nebraska.

Defendant Excepts: James G. Reeder, Judge.

2. It was charged in the petition that the shipment of said cattle was made from said Palmer at 5:20 P. M. on September, 6th, 1905; that said Cattle were received in South Omaha, Nebraska, at 12:55 P. M. on September 7th, 1905; That the said distance from said Palmer to the Stock Yards at South Omaha over defendant's line of road does not exceed 166 miles; that the entire time consumed by the said train on which said cattle were shipped in picking up and setting out and unloading stock at stations between said Palmer and said South Omaha did not exceed one hour and that said train conveying said stock should, if run at a reasonable rate of speed and without unnecessary stops and without stops unreasonably prolonged, have reached the stock yards at South Omaha, Nebraska, within ten and a half hours after it left Palmer, Nebraska, and that the time used by said defendant in conveying said cattle on said train between said Palmer and said South Omaha was negligently, unnecessarily and unlawfully prolonged for a period of nine hours over and above the time allowed by law for the purpose, that by reason of said prolonging of said time in the shipment of said cattle, the plaintiff claims damages in the sum of $450.00 and for which with the costs of suit it prays judgment.

Defendant Excepts. James G. Reeder, Judge.

8 3rd. The answer of the defendant admits the shipment of said cattle — charges that the plaintiff agreed to accompany and look after and care for the said cattle and did accompany the same for that purpose and if any loss or damage was sustained in said shipment it was the result of the said plaintiff's own carelessness and negligence and without any fault on the part of the defendant.

Defendant Excepts: James G. Reeder, Judge.

The answer further denies each and every allegation of the petition other or different than herein stated.

4th. The Reply of the plaintiff is a general denial of each and every allegation contained in defendant's answer except such allegation- that admit the truth of the statements contained in the petition.

Defendant Excepts: James G. Reeder, Judge.

5th. You are instructed that section 122 "A" of the compiled Statutes of Nebraska provides as follows:

It is hereby declared and made the duty of each corporation individual or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska in transporting live stock from one point to another in said state in car load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiveing said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles travelled including the time of stops at stations or other points.

The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required as provided in this Schedule.

9 And that section 122 "B" of the Compiled Statutes of Nebraska provided as follows:

Any individual, corporation, or association, of individuals, violating any provisions of this act shall pay to the owner of such live stock, the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered. That both of said sections of our statutes were in force at the time of the shipment of said cattle.

Defendant Excepts. James G. Reeder, Judge.

To warrant you in returning a verdict for the plaintiff in this cause he must establish by a preponderance of the evidence the following facts:

First. That on or about the date mentioned in his petition, he shipped five cars of cattle from Palmer, Nebraska, consigned to parties in South Omaha, Nebraska.

Defendant Excepts. James G. Reeder, Judge.

Second. That said cattle were shipped over a line of the road owned or operated by the defendant.

Third. That the time consumed by the defendant in transporting

said cattle from Palmer, Nebraska, to South Omaha, Nebraska, exclusive of time consumed in picking up, setting out, loading and unloading stock at stations, exceeded one hour for each 18 miles of travel between said Palmer and said South Omaha.

Defendant Excepts. James G. Reeder, Judge.

Fourth. If you find that the time consumed did exceed one hour for each 18 miles of distance between said points exclusive of the time consumed in picking up and setting out, loading and unloading stock at intervening stations, then and in that case you should, in making up your verdict, allow the plaintiff the sum of $10. per car for each hour the time consumed in said shipment exceeded 18 miles per hour for the said shipment, together with interest from the 7th day of September, 1905, to the present time.

Defendant Excepts. James G. Reeder, Judge.

Fifth. If you find from the evidence that the time consumed by the defendant in transporting said cattle between Palmer, Nebraska, and South Omaha, Nebraska, excluding time consumed in picking up, setting out, loading, and unloading at intervening stations did not exceed one hour for each 18 miles of travel between said stations then and in that case your finding and verdict should be fore the defendant.

Defendant Excepts. James G. Reeder, Judge.

Two forms of verdict will be handed you with these instructions, and when you have agreed upon a verdict, have your foreman sign it and all return with it into court.

JAMES G. REEDER, *Judge.*

Instructions Tendered by Defendant and Refused.

In the District Court, Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

The jury are instructed that on the issues joined and the evidence introduced in this case, the plaintiff is not entitled to recover, and you are therefore instructed to return a verdict in favor of the defendant.

Tendered by Defendant, refused. Defendant excepts. James G. Reeder, Judge.

2. The jury are instructed that the plaintiff is not entitled to recover Ten Dollars per car, or any other sum as a penalty under the statute of Nebraska, for failing to move the shipment of said stock at the rate provided for by the statute on the branch lines used in said shipment.

Tendered by Defendant, refused. Defendant Excepts. James G. Reeder, Judge.

And afterwards on the 28th day of May, 1907, there was filed and entered of record in the office of the clerk of said court a certain "Verdict," which is as follows, to-wit:

Verdict of the Jury.

May Term, A. D. 1907, to wit, May 28th, 1907.

THE STATE OF NEBRASKA,
Merrick County, ss:

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

We the Jury in this case, being duly impaneled and sworn in the above entitled cause do find for the plaintiff and against the defendant and assess the plaintiff's damages at the sum of $450. with 7% interest from the 7th day of September, 1905, to
12 the present time, viz: $54.25. Total, $504.25.

FRANK GREGG, *Foreman.*

Journal Entry for May 27th, 1907.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Now on this day to-wit: May the 27th, 1907, came the parties and their attorneys and also the following named persons as jurors to-wit: Joe Gray, John McMahon, Sr., Frank Greeg, W. T. Morriss, Wm. Wilhelmi, Mox Holtorf, David Hanna, Charles Robinson, Grant Brannan, Gilbert M. Brown, H. J. Perrel, and Frank Larson, who were duly empaneled and sworn according to law and having heard the evidence adduced, whereupon the Court adjourned until tomorrow morning at nine o'clock, in the forenoon.

JAMES G. REEDER, *Judge.*

Journal Entry for May 28th, 1907.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Now on this day to-wit: May the 27th, 1907, court convened pursuant to adjournement and at said time came the parties and their

attorneys and also the following named persons as jurors who had heretofore been duly empaneled and sworn according to law in said cause, to-wit: Joe Gray, John McMahon, Sr., Frank Gregg, W. T. Morris, Wm. Wilhelmi, Mox Holtorf, David Hanna, Charles Robinson, Grant Brannan, Gilbert M. Brown, H. J. Perrel, and
13 Frank Larson, and having heard all the evidence adduced by the parties the arguments of counsel, and the instructions of the court, retired in charge of a sworn bailiff of said court for deliberation, and on the same day returned into open court the following verdict in writing duly signed.

Verdict of Jury.

May Term, A. D. 1907, to wit: May 28th, 1907.

THE STATE OF NEBRASKA,
Merrick County, ss:

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

We the jury in this case, being duly empaneled and sworn in the above entitled cause to find for the plaintiff and against the defendant and assess the plaintiff's damages at the sum of $450.00 with 7% interest from the 7th day of September, 1905, to the present time, viz: $54.25. Total, $504.25.

FRANK GREGG, *Foreman.*

It is therefore considered by the court that the plaintiff recover from the defendant the sum of $504.25 and costs of suit taxed at $—.

JAMES G. REEDER, *Judge.*

And afterwards on the 28th day of May, 1907, there was filed or entered of record in the office of the Clerk of the said court a certain "Motion for a new trial," which was in the words and figures following, to-wit:

14 In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Motion for a New Trial.

The defendant moves the court to set aside the verdict and to grant a new trial in this case for the following reasons:

First. The petition does not state facts sufficient to constitute a cause of action against the defendant and on the facts alleged the plaintiff is not entitled to recover.

Second. The Verdict is contrary to law and is not supported by sufficient evidence to sustain it.

Third. The court erred in overruling the motion of the defendant at the end of the trial to direct a verdict in his favor, and to give the first instruction requested for that purpose.

Fourth. For errors of law occurring at the trial to which the defendant excepted at the time.

Fifth. The court erred in giving its instruction marked No. 1.

Sixth. The court erred in giving its instruction marked No. 2.

Seventh. The court erred in giving its instruction marked No. "3."

Eighth. The Court erred in giving its instruction marked No. "4."

Ninth. The Court erred in giving its instruction marked No. "5."

Tenth. The court erred in giving its instruction marked No. "6."

Eleventh. The court erred in refusing to give the first instruction requested by the defendant marked No. "1."

Twelfth. The Court erred in refusing to give the second instruction requested by the defendant marked No. "2."

Thirteenth. The court erred in submitting to the jury the question of the defendant's liability based upon a Nebraska Statute governing the rate of speed at which stock trains shall be run because said statute is unconstitutional and void and cannot support the verdict. If this motion is overruled defendant requests that exceptions be noted and that it be allowed forty days from the rising of court within which to prepare its bill of exceptions.

FRANK M. DEWEESE,
Attorney for Defendant.

And afterwards on the 29th day of May, 1907, there was filed or entered of record in the office of the Clerk of said court a certain "Amendment to Motion for a new trial," which was in the words and figures following, to-wit:

In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Amendment to Motion for a New Trial.

Comes now the defendant and in support of the motion for a new trial already filed, and to make the same more definite and certain,

and explaining more at length the reasons therein given as to why new trial should be granted, offers the following:

16 1st. The amount of the recovery is based upon a penalty imposed upon the defendant regardless of any loss or damage to the plaintiff and such damage as a penalty cannot be sued for nor recovered by the plaintiff individually, and if it could be enforced and recovered at all it must be recovered as a fine or penalty to be approp-iated to the school fund as is provided by the constitution of the State, Article 8 Section, 5.

2nd. The court erred in its findings and judgment in giving force and effect to the statute of the State assessing the penalty or liquidated damages in the shipment complained of because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damage to the plaintiff, and is an appropriation of the property of the defendant and confiscation of the same to the private use of the plaintiff without due process of law, and is a deprivation to the defendant of its property without due process of law, and denial to it of the equal protection of the law in violation of the provisions of the 14th, article of the amendments of the Constitution of the United States, and also in violation of the bill of rights and constitution of this state.

3rd. The findings and judgment of the court are a violation of the provisions of section 1 of Article 14 of the amendments of the constitution of the United States in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, and are an approp-iation of the defendant's property to the plaintiff's private use arbitrarily and in violation of said provisions of the Constitution of the United States.

JOHN PATTERSON AND
J. W. DEWEESE,
Att'ys for Defendant.

17 *Journal Entry for July 3rd*, 1907.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Now on this day to-wit: July the 3rd, 1907, came the parties and their attorneys whereupon said cause came on to be heard upon the motion and amendment to the motion to set aside the verdict and grant new trial filed herein on the 28th, and 29th, days of May, 1907, respectively, and the court having heard the arguments of counsel and being fully advised in the premises, on consideration overrules said motion and amendments thereto, to which ruling of the court, Defendant excepts. It is therefore considered by the court that said motion and amendments thereto be and the same hereby are overruled and it is further considered that the plaintiff have and

recover from the defendant the sum of $504.25 in accordance with the judgment of this court heretofore pending in said cause on the 28th, day of May 1907, and costs of suit, to all of which rulings and judgment of the court defendant excepts: And it is further ordered by the court that the defendant be allowed 40 days in which to prepare and serve bill of exceptions.

STATE OF NEBRASKA,
Merrick County, ss:

I, Melvin G. Scudder Clerk of the District Court in and for Merrick County, Nebraska, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in the case of James M. Kyle against The Chicago, Burlington and Quincy Railway Company, a corporation as fully as the same remains on file and of record in my office, consisting of Petitions, answer, Reply, Instructions to Jury, instructions tendered by Deft. and refused, Verdict, Judgment Motion for new trial and amendment to motion for new trial, and all Journals in said cause.

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I further certify that the bill of exceptions hereto attached is the original bill of exceptions filed in my office in the above entitled action.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said District Court this 27 day of July A. D. 1907.

[SEAL.] MELVIN G. SCUDDER, *Clerk.*

Fee for making Transcript $6.15.
Clerk of District Court, Merrick County, Nebraska.

Endorsed: 15383. Kyle v. C., B. & Q. Ry. Co. Transcript. Supreme Court of Nebraska. Filed Aug. 22, 1907. H. C. Lindsay, Clerk.

And on the same day, to-wit, on the 22nd day of August, 1907 there was filed in the office of the clerk of said supreme court a certain Bill of Exceptions, in the words and figures following, to-wit:

In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Defendant's Bill of Exceptions.

19

Be it remembered that at the May A. D. 1907 term of Merrick County Nebraska District Court, to-wit, on the 28th day of May, 1907, that being one of the days of said term on the trial of the cause of James M. Kyle versus Chicago, Burlington & Quincy

Railway Company in the District Court of Merrick County, Sixth Judicial District of Nebraska, the above named plaintiff, and the above named defendant, each to maintain the issues of their respective parts adduced evidence, and all of the said evidence, the objections thereto, with the grounds therefor, all of the oral motions and admissions made at the trial, with all of the rulings of the Court on such objections or motions, and all of the exceptions to such rulings made and taken at the time, having been by the said defendant reduced to writing within the time therefor allowed by the court in this the Defendant's Bill of Exceptions, and the same having been served on the attorney for the plaintiff for examination and amendment, the defendant now prays the Honorable Judge before whom the said cause was tried, that this, the Defendant's Bill of Exceptions may be settled, allowed, signed, sealed and made a part of the record in the aforesaid cause in the aforesaid Court.

Received of J. W. Deweese & Patterson & Patterson for examination and amendment, a draft of a Bill of Exceptions in the case of James M. Kyle, vs. Chicago, Burlington and Quincy Railway Company, a corporation, Tried in the District Court of Merrick County, Nebraska, at the May, 1907, term thereof.
Dated July 13th, 1907.

MARTIN & AYRES.
Plaintiff's Att'ys.

We herewith return the draft of the Bill of Exceptions in the above mentioned case submitted to us on the 13th day of July, 1907, and propose the following amendments:—That the words "It was a little after noon, about 1 o'clock." be inserted as a part of the answer of the witness J. M. Kyle, to the following question asked by the court as shown on page 6 of the bill of exceptions, to-wit: "Was it by night or by day".

MARTIN & AYRES.

The defendant consents that the witness'es answer read as follows "It was on September seventh: the following day at about one o'clock in the afternoon".

JOHN PATTERSON &
J. W. DEWEESE,
Att'ys for Def.

Index.

Plaintiff's Witnesses:

James M. Kyle, 7.
No Exhibits.

In the District Court of Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, a Corporation.

Bill of Exception.

Be it remembered, that on the 28th day of May, 1907, the same being one of the days of the regular May, 1907, term, of the District Court of Merrick County, Nebraska, this cause came on for hearing, present, Hon. James G. Reeder, judge of said Court, and the following evidence was introduced by the parties.

Appearances:

Martin & Ayres, for plaintiff.
Patterson & Patterson, J. W. Deweese and E. F. Bishop.

21 Mr. JAMES M. KYLE, being first duly sworn in behalf of the plaintiff and examined in chief by Mr. Geo. W. Ayres, testifies as follows:

1 Q. State your name and place of residence?
A. Name is James Kyle. I live at Palmer.
2 Q. How long have you lived in Palmer or vicinity?
A. Eight years this spring.
3 Q. What is your occupation?
A. Farming, cattle feeder, generally mixed business, farming and stock raising.
4 Q. Did you have any business transactions with the defendant the Chicago, Burlington and Quincy Railway on the 6th. day of September, 1905?
5 A. Yes, I shipped some cattle that day.
Q. How many cattle were there in this shipment?
6 A. One hundred head.
Q. In how many cars were they shipped?
7 A. Five cars.
Q. Were they shipped in carload lots?
8 A. Yes, twenty in each car.
Q. Did you pay the defendant for shipping the cattle?
9 A. Yes, at Chicago.
Q. Did you accompany the cattle?
10 A. Yes.
Q. At what time did the train carrying these cattle leave Palmer, Nebraska, if you know?
11 A. About five o'clock. Their own statement shows 5:20.
Q. At what time did it reach the stock yards at South Omaha, Nebraska.
22 12 A. Sometime near one o'clock.
Q. Do you know the distance from Palmer, Nebraska, to

South Omaha, Nebraska, on the defendant line over which these cattle were shipped?

13 A. I think the distance is 164 Miles.

Q. You are satisfied that that is the distance are you?

14 A. Yes.

Q. Who was the owner of these cattle?

15 A. I was the owner.

Q. To whom consigned?

16 A. Clay, Robinson and Company.

Q. For what purpose were they consigned to Clay, Robinson & Company?

Objected to as incompetent and immaterial. Overruled. Exception.

A. To sell for me.

17 Q. Do you know how much time was consumed in setting out, loading and unloading stock at Stations between Palmer, Nebraska, and South Omaha, Nebraska by the train on which your cattle were shipped.

Objected — as incompetent, immaterial under the issues. Overruled. Exception.

A. I do not exactly.

18 Q. Are you able to state about what time?

A. I think something like one hour.

Objected to as incompetent and being the conclusion of the witness, not responsive. Overruled, Exception.

19 Q. Will you say that it was not more than one hour?

Objected to as leading. Sustained.

Q. How long have you been engaged in the business
23 of feeding and shipping cattle, Mr. Kyle?

20 A. A little better than 20 years.

Q. Have you shipped cattle to the Stock Yards at South Omaha, Nebraska, prior to this shipment?

A. I have.

21 Q. You may state to the jury what were the facts regarding these cattle reaching South Omaha, in time to be sold on the market that day?

Objected to as incompetent and immaterial under the issues in this case and calling for a conclusion of the witness. Sustained. Exception.

By the COURT: I didn't understand the date of their arrival at South Omaha. Was it by night or by day.

—. It was on September 7th, the following day at about one o'clock in the afternoon.

22 Q. Now Mr. Kyle are you able to fix the time that you know the defendants were engaged in setting out, or taking on stock trains between Palmer, Nebraska, and South Omaha?

A. Yes, I am certain that I do.

23 Q. Well what time do you fix the time at?

Objected to as incompetent, immaterial, the witness not having shown himself qualified to answer under the issues in this case. Sustained.

24 Q. State how much time, if you know, was consumed by the defendants on the trip from Palmer, Nebraska, to South Omaha, in taking on stock and setting out stock between Palmer, Nebraska, and South Omaha, Nebraska? You may state—— State as near as you can?

24 Objected to as incompetent under the issues in this case and witness is not qualified to answer. Overruled. Exception.

A. My recollection is that there was very little stock taken on. The train was mostly dead freight. It has been a good while and I can't say the amount of stock taken on or the length of time it took. But it laid for hours at a time.

Defendant move- to strike our the last answer of the witness as incompetent and as a conclusion of the witness. Overruled. Exception.

Defendant moves to strike out that last part where he remakrs that "it laid for hours at a time," as being incompetent and as a conclusion of the witness and the witness not qualified to answer. Overruled. Exception.

25 Q. You testified that you accompanied the train?

A. Yes.

26 Q. Are you able to state approximately the time taken by this train on taking on and setting off or unloading and loading stock between Palmer, Nebraska, and South Omaha.

Objected to as incompetent, immaterial under the issues in this case. Overruled. Exception.

27 Q. Are you able to state approximately?

A. Yes.

28 Q. You may state?

Objected to as incompetent and immaterial under the issues in this case. Overruled. Exception.

29 Q. State?

A. I think it was one hour. My idea was one hour. Approximately one hour.

30 Q. Is that right as near as you can remember?

25 Objected to as incompetent, immaterial and calling for a conclusion of the witness and witness not being qualified. Overruled. Exception.

No cross-examination.

Plaintiffs rest-.

Defendants rest.

The defendant moves the Court to direct a verdict for the defendant because on the issues joined and evidence introduced in this case, the plaintiff is not entitled to recover.

Overruled. Exception.

The Plaintiff moves the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant for the sum of $450.00 for the reason that the case being now closed and both parties having rested and the disputed evidence in this case shows that the defendant was at least nine hours longer in transporting plaintiff's cattle from Palmer, Nebraska, to South Omaha, Nebraska, than the time allowed by law for that purpose.

Overruled. Exception.

The plaintiff now moves the Court for leave to amend his petition filed in this cause to conform to the proof by striking out of the Fourth paragraph of his petition the following words:

"Said cattle lost weight and reached the said stock yards in poor condition and to- late to be sold on the market on the day of their arrival and the plaintiff was to the additional expense for their care and keeping and in order that he might sell said cattle at a reasonable price, was compelled to and di- re-ship said cattle at his own expense in the sum of $— to Chicago, Illinois. And to
26 amend the phrase "The plaintiff damaged in the sum of $450.00, to read" the plaintiff has been damaged in the sum of $450.00.

Defendant objects to the amendment and change made by the plaintiff in the petition for the reason that the petition before being amended and as it existed when this case went to trial and was tried did not state a cause of action against the defendant and that it is erroneous to now permit such amendment of the petition.

Amendment allowed. Defendant excepts.

Case closed.

I, W. E. Martin, Reporter, do hereby certify that the above and foregoing is a full, true and correct copy of all testimony given in the above entitled case, wherein James M. Kyle was plaintiff and the Chicago, Burlington & Quincy, defendant.

W. E. MARTIN.

In the District Court, Merrick County, Nebraska.

JAMES M. KYLE, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
Defendant.

Order Allowing and Settling Bill of Exception.

Now, on this 26th day of July, 1907, this cause coming further to be heard on the motion of the defendant, that this, the Defendant's Bill of Exceptions, may be settled, allowed, signed, sealed and made a part of the record in said cause in said court, and it appear-

ing to me, the undersigned Judge, before whom said cause was tried, that said defendant having within the time heretofore allowed by the Court for that purpose, reduced to writing in this, the Defendant's Bill of Exceptions, all of the evidence adduced or
27 offered on the trial of said cause; all of the objections, with the grounds therefor, made to the admission of evidence; all oral motions and admissions of the parties made at the trial; all of the rulings of the Court on such objections or motions, and all of the exceptions to such rulings made and taken at the time, and, having served the same on the attorneys for the before named plaintiff, according to law, for examination and amendment, and the same being now here before me, I, the said Judge, before whom said cause was tried, do hereby certify that this, the Defendant's Bill of Exceptions, contains all of the evidence adduced or offered on the trial of said cause; all of the oral motions, and admissions of the parties made at the trial; all of the objections made to the admission of evidence; all of the rulings of the court on such objections or motions, and all of the exceptions to such rulings made and taken at the time.

Wherefore, I, the said Judge, do hereby settle, allow, and sign this, the Defendant's Bill of Exceptions, and do hereby order that it be made a part of the record in said cause in said court.

JAMES G. REEDER, *Judge.*

Clerk's Certificate.

STATE OF NEBRASKA,
Merrick County, ss:

I, Melvin G. Scudder, Clerk of the District Court, within and for said County and State, do hereby certify that this is the original Bill of Exceptions filed in my office July 27, 1907, in the above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 27 day of July, 1907.

[SEAL.] MELVIN G. SCUDDER,
Clerk District Court.

28 Endorsed: Filed. Date, July 27, 1907. Melvin G. Scudder, Clerk District Court, Merrick County, Nebr. 15383. Kyle v. C., B. & Q. Ry. Co. Bill of Exceptions. Supreme Court of Nebraska. Filed Aug. 22, 1907. H. C. Lindsay, Clerk.

And on the same day, to-wit, 22nd day of August, 1907, there was filed in the office of the clerk of said Supreme Court, a certain præcipe and assignments of error, in the words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

JAMES M. KYLE, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Brief of Errors on Appeal and Præcipe.

The Chicago, Burlington & Quincy Railway Company, appellant complains of James M. Kyle, the appellee that on May 28th, 1907, the appellee recovered a judgment against the said appellant in the District Court of Merrick County, Nebraska, in the sum of $504.25 and costs, in an action then pending in said court, in which James M. Kyle was plaintiff, and the Chicago, Burlington & Quincy Railway Company was defendant.

The Clerk of the Court is hereby requested to issue notice of this appeal to the said James M. Kyle as above designated.

A transcript of said judgment, of the record and proceedings of the court therein, together with a bill of exceptions are filed herewith.

The appellant alleges that there is error in said judgment
29 record and proceedings as follows:

1. The court erred in overruling motion for new trial of defendant below.

2. The judgment is not supported by sufficient evidence to sustain it, and is contrary to law.

3. The amount of the verdict is excessive and is not supported by the evidence.

4. The instructions and judgment are erroneous because there was no fault nor violation of any duty on the part of the defendant company in carrying said shipments, according to the rules, laws and usages governing common carriers of live stock, which was all the duty imposed on the defendant by the laws and constitution of the state of Nebraska.

5. The amount of the recovery in this case is a penalty imposed upon the defendant regardless of any loss or damage to the plaintiff, and such damage as a penalty cannot be sued for nor recovered by the plaintiff individually, but if it could be enforced at all, it must be recovered as a fine or penalty and be appropriated to the school fund as is provided by the constitution of the state of Nebraska, Article 8, Section 5, and the act of the legislature under which appellee seeks to maintain said cause of action and judgment against this defendant is therefore unconstitutional and void.

6. The court erred in its instructions and judgment in giving force and effect to the statute of the state assessing the penalty or liquidated damages in this shipment because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damage to the plaintiff and is an appropriation of the property of the defendant, and confiscation of the same, to

the private use of the plaintiff without due process of law,
30 and is a denial to it of the equal protection of the law in violation of the provisions of the 14th article of the amendments to the Constitution of the United States, and also in violation of the bill of rights and constitution of this state.

7. The instructions and judgment of the court are an impairment of the obligation of the contract of shipment entered into between the plaintiff and defendant and a refusal to give effect to such contract in violations of the provision of the Constitution of the United States, Section 10, Article 1.

8. The court erred in permitting the plaintiff to amend his petition as shown on the last page of the bill of exceptions, after the taking of testimony had been closed.

9. The court erred in overruling the motion of the defendant to direct a verdict in its favor, made at the end of taking testimony.

10. The court erred in refusing to give the first instruction requested by the defendant.

11. The court erred in refusing to give the second instruction requested by the defendant.

12. The court erred in giving its first instruction.

13. The court erred in giving its second instruction.

14. The court erred in giving its third instruction.

15. The court erred in giving its fourth instruction.

16. The court erred in giving its fifth instruction.

17. The court erred in giving the first subdivision of its fifth instruction.

18. The court erred in giving the second subdivision of its fifth instruction.

19. The court erred in giving the third subdivision of its fifth instruction.

20. The court erred in giving its fourth subdivision of its fifth instruction.

31 21. The court erred in giving its fifth subdivision of its fifth instruction.

22. The court erred in overruling the objection of defendant to question numbered 17, and in permitting the same to be answered.

23. The court erred in refusing to strike out the answer to question numbered 18.

24. The court erred in overruling defendant's objection to question numbered 24.

25. The court erred in refusing to strike out the last part of the plaintiff's answer to question 24.

26. The court erred in overruling defendant's objection to questions numbered 26, 27, 28 and 29, and in permitting the same to be answered.

Wherefore, the appellant prays that said judgment be reversed, and the action be dismissed.

J. W. DEWEESE &
FRANK E. BISHOP,
Att'ys for Appellants.

Endorsed: 15383. Kyle v. C., B. & Q. Ry. Co. Præcipe Brief of Assignments of Error. Supreme Court of Nebraska. Filed Aug. 22, 1907. H. C. Lindsay, Clerk.

And on the same day, to-wit, 22nd day of August, 1907, there was made to issue out of the office of the clerk of said supreme court, a certain Notice of Appeal, in the words and figures following, to-wit:

32 *Notice of Appeal.*

THE STATE OF NEBRASKA, *ss:*

To the Sheriff of the County of Merrick:

You are hereby commanded to notify James M. Kyle That an appeal has been taken to the Supreme Court of the State of Nebraska by Chicago, Burlington & Quincy Railway Company asking the reversal of a judgment against it rendered on the 28th day of May, A. D. 1907, in a certain cause in the District Court of Merrick County, wherein James M. Kyle was Plaintiff, and Chicago, Burlington & Quincy Ry. Co. was Defendant.

You will make due return of this notice, on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 22nd day of August, 1907.

H. C. LINDSAY, *Clerk.*
By VICTOR SEYMOUR, *Deputy.*

Endorsed: General No. 15383. Supreme Court State of Nebraska. Kyle v. Chicago, Burlington & Quincy Ry. Co. Notice of Appeal.

And afterwards, to-wit, on the 26th day of August, 1907, said Notice of Appeal theretofore issued out of the office of the clerk of said supreme court was returned and filed in the office of said clerk with service endorsed thereon in the words and figures following, to-wit:

Service of the within Notice of Appeal acknowleged this 24th day of August, 1907.

JAMES M. KYLE,
Appellees.
By MARTIN & AYRES,
His Attorneys.

33–37 Endorsed: Supreme Court of Nebraska. Filed Aug. 26, 1907. H. C. Lindsay, Clerk.

* * * * * * *

38 And afterwards, to-wit, on the 12th day of February, 1909, there was filed in the office of the clerk of said supreme court a certain Request for Oral Argument, in the words and figures following, to-wit:

39 15383.

KYLE
v.
C., B. & Q. R. Co.

Request of Appellant for Oral Argument.

Endorsed: Supreme Court of Nebraska. Filed Feb. 12, 1909. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 16th day of February, 1909, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1909.

Feb. 16.

The following causes were argued by counsel and submitted to the Court:

* * * * * * *

15383.

KYLE
v.
C., B. & Q. R. Co.

Appeal from Merrick County.

* * * * * * *

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 11th day of June, 1909, there was rendered by said court and entered of record upon the journal thereof a certain judgment in the words and figures following, to-wit:

40 Supreme Court of Nebraska, January Term, A. D., 1909.

June 11.

No. 15383.

JAMES M. KYLE, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court Merrick County.

This cause coming on to be heard upon appeal from the district court of Merrick County, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find

no error apparent in the reocrd of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court, be, and the same hereby is, affirmed; that appellee pay all costs incurred herein by him, taxed at $—, and have and recover from appellant all his costs so expended herein; that appellant pay all costs incurred herein by it, taxed at $—, for all which execution is hereby awarded, and that a mandate issue accordingly.

JOHN B. BARNES,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which Opinion is in the words and figures following, to-wit:

41

No. 15383.

KYLE
v.
CHICAGO, B. & Q. R. Co.

Opinion.

Filed June 11, 1909.

1. Section- 10606 and 10607, Cobbey's Annotated Statutes, 1907, are valid, and in an action thereunder where plaintiff fully proves all of the allegations of his petition, and defendant does not controvert said proof, or establish any defense to the action, the judgment of the district court will be affirmed.

42 ROOT, *J.:*

This action was instituted to recover liquidated damages for defendant's failure to transport plaintiff's live stock as rapidly as required by section- 10606 and 10607, Cobbey's Annotated Statutes 1907. Defendant did not plead any defense other than a general denial and the affirmative allegation that plaintiff accompanied his stock and any damage sustained by said shipment was the result of his own negligence and carelessness.

On the trial plaintiff made proof of the allegations in his petition, and defendant did not introduce any evidence whatever. In its brief defendant assails the validity of the law and criticises plaintiff's testimony as to the time consumed by defendant on said trip in setting out and picking up live stock not owned by plaintiff. None of the instructions are criticised, and in the state of the record, and for the reasons stated in Cram v. Chicago, Burlington & Quincy Railway Company, decided this term of court, p. — ante, — N. W., —, the case is affirmed.

43 And afterwards, to-wit, on the 2nd day of July, 1909, there was filed in the office of the clerk of said Supreme Court a certain Motion for Rehearing, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

JAMES M. KYLE, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Motion for a Rehearing.

Brief of Appellant.

The appellant, Chicago, Burlington & Quincy Railway Company, moves the court to vacate and set aside the judgment of affirmance rendered herein June 11th, 1909, and to grant a rehearing in this case, and in support -hereof assigns the following grounds:

1. The court erred in affirming the judgment of the district court.

2. The court erred in determining to be valid, Chapter 107, laws of Nebraska, 1905, sections 10606 and 10607, Cobbey's Annotated Statutes of 1907. The said statute is unreasonable, arbitrary and discriminatory, and operates to deprive appellant of the equal protection of the laws, and to deprive appellant of its property without due process of law, in which respects it is violative of the provisions of article 14 of amendments to the Constitution of the United States and, therefore, null and void.

3. The said statute is violative of sections eleven and fifteen of articles three and of section five of article eight and of section four of article eleven of the Constitution of the State of Nebraska, and for that reason is null and void.

44 4. The court erred in holding that a suit by a shipper to enforce the said statute does not put in issue the constitutional validity thereof predicated upon section four of article eleven of the constitution of Nebraska, in like manner as would a suit by a shipper to avoid the same statute as violative of that provision of the constitution.

5. The court erred in holding that appellant in presenting the issue that said statute is violative of section four of article eleven of the constitution was attempting to litigate a shipper's rights in a "hypothetical case."

6. A suit by a shipper to enforce a specific statute which has proceeded to judgment in the district court in his favor for $504.25 can not, upon the appeal of his adversay in the Supreme Court, be regarded as a "hypothetical case."

JAMES E. KELBY,
HALLECK F. ROSE,
FRANK E. BISHOP,
Attorneys for Appellant.

Endorsed: 15383. In the Supreme Court of the State of Nebraska. James M. Kyle, appellee vs. Chicago, Burlington and Quincy Railway Company, appellant. Motion for a Rehearing. Frank E. Bishop, James E. Kelby, Halleck F. Rose, For Appellant. Supreme Court of Nebraska. Filed Jul. 2, 1909. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 14th day of December, 1909, there was rendered by said supreme court and entered of record upon the journal thereof a certain order overruling motion for rehearing, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

Dec. 14.

No. 15383.

JAMES M. KYLE, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Merrick County.

45 This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore, considered, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein refused and denied.

M. B. REESE,
Chief Justice.

* * * * * * *

46 & 47 And afterwards, to-wit, on the 25th day of March 1910, there was rendered by said supreme court and entered of record upon the journal thereof a certain order granting leave to file second motion for rehearing, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1910.

March 25.

No. 15383.

JAMES M. KYLE, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Appeal from the District Court of Merrick County.

Upon application, it is by the court ordered that defendant, appellant herein, be, and hereby is, granted leave to file a second motion for rehearing herein, and that the said motion be orally argued at the session of court commencing April 18, 1910.

M. B. REESE,
Chief Justice.

And on the same day, to-wit, 25th day of March, 1910, there was filed in the office of the clerk of said supreme court, a certain second motion for rehearing, in the words and figures fol-owing, to-wit:

In the Supreme Court of the State of Nebraska.

JAMES M. KYLE, Appellee,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Appellant.

48 *Motion for a Second Rehearing.*

The appellant, Chicago, Burlington and Quincy Railway Company, by leave of court first granted, moves the court for a second and further rehearing of this case, and in support -hereof appellant says the court erred in its proceedings and judgment herein in the particulars following:

1. The court erred in adhering to its former judgment rendered June 11th, 1909, and in overruling appellant's motion for a rehearing.

2. The court erred in affirming the judgment of the district court.

3. The court erred in holding that chapter 107, laws of Nebraska, 1905, Cobbey's Annotated Statutes, sections 10606 and 10607, is a valid legislative enactment. Said statute is void for the following reasons:

(*a*) It is violative of section 4 of article 11 of the Constitution of Nebraska, providing that the liability of railroads as common carriers shall never be limited.

(*b*) It is violative of section 5 of article 8 of the Constitution of

Nebraska providing that all penalities shall be appropriated exclusively to the use and support of common schools.

(c) It is violative of article 2 of the Constitution of Nebraska distributing the powers of government, and providing that no person or collection of persons being one of the departments of government shall exercise any power properly belonging to either of the others.

(d) It is violative of section 1 of article 6 of the Constitution of Nebraska conferring all the judicial power of the State upon the Courts of Justice.

(e) It is violative of section 3 of article 1 of the Constitution of Nebraska, providing that no person shall be deprived of life,
49 liberty or property without due process of law.

(f) It is violative of section 11 of article 3 of the Constitution of Nebraska, providing that no law shall be amended unless the new act shall contain the section or sections so amended and the section or sections so amended shall be repealed.

(g) It is violative of section 15 of article 3 of the Constitution of Nebraska prohibiting special legislation, in that it regulates the practice of courts of justice in respect to assessment of damages in a special class of cases only, and its provisions are special where a general law could be made applicable.

(h) It is violative of article 14 of Amendments to the Constitution of the United States, in that it is unreasonable, arbitrary, and discriminatory and operates to deprive appellant of its property without due process of law, and to deprive appellant of the equal protection of the laws.

4. The court erred in holding that appellant is not prejudiced by enforcement in this case of the provisions of chapter 107 of the laws of Nebraska, 1905, and that appellant is without standing as a suitor in this case to question the constitutional validity of said act.

5. The court erred in refusing and declining to entertain, consider and determine the issue of law that chapter 107 of the laws of Nebraska, 1905, is violative of section 4 of article 11 of the Constitution providing that the liability of railroads as common carriers shall never be limited.

6. The court erred in holding that it is within the power of the legislative branch of the government to determine and liquidate the measure of damages and fix the compensation to be awarded by the courts of justice in favor of a shipper against a railroad company for each hour of delay in transporting live stock. The
50 legislative attempt to do so is a usurpation of power which the constitution delegates exclusively to the courts.

7. The court erred in holding that the quantum of measure of damages caused by delay in transporting stock is attended with any special or peculiar difficulty of proof, and because thereof is a legitimate subject of political or legislative policy to be liquidated by legislative enactment with like effect as if done by contract of the parties. Appellant says the law is, to the contrary, that the actual damages in such cases are of ready and convenient proof and

definite and certain in amount; and the common law rule of actual compensation, adopted by the people and embodied in section 4 of article 11 of the State Constitution, is the exclusive rule of liability of railroads in such cases and is binding and obligatory upon the legislature, the courts and the contracting parties.

8. The act in question, in all cases where the damages prescribed exceed the loss sustained, operates as a rebate and preference in favor of the shipper of live stock and *in* repugnant to other valid statutes forbidding the payment of rebates and the granting of preferences; in all cases where the damages prescribed are less than the loss sustained the act operates to limit the liability of railroads as common carriers and to abolish the common law rule of actual compensation, and is repugnant to said section 4 of article 11 of the Constitution of Nebraska; and however construed is contrary to the public policy of the state, as declared in the constitution and in numerous valid statutes enacted pursuant thereto, and not referred to nor repealed by the act in question.

JAMES E. KELBY,
HALLECK F. ROSE,
Attorneys for Appellant.

51 Endorsed: 15383. In the Supreme Court of the State of Nebraska. James M. Kyle, Appellee, vs. Chicago, Burlington and Quincy Railway Company, Appellant. Motion for a second rehearing. James E. Kelby, Halleck F. Rose, for Appellant. Supreme Court of Nebraska. Filed Mar. 25, 1910. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 19th day of April, 1910, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1910.

April 19.

The following causes were argued by counsel and submitted to the court:

* * * * * * *

No. 15383.

KYLE
v.
C., B. & Q. R. Co.

(On motion for Rehearing.)

Appeal from Merrick County.

* * * * * * *

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 23d day of November, 1910, there was rendered by said supreme court and entered of record upon the journal thereof a certain order overruling motion for rehearing, in the words and figures following, to-wit:

52 Supreme Court of Nebraska, September Term, A. D. 1910.

Nov. 23.

No. 15383.

JAMES M. KYLE, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Merrick County.

This cause coming on to be heard upon second motion of appellant for a rehearing herein, heretofore filed herein by leave of court, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore, considered, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein denied.

M. B. REESE,
Chief Justice.

53 And afterwards, to-wit, on the 3d day of December, 1910, there was filed in the office of the clerk of said supreme court a certain petition for writ of error, which said original petition for writ of error is hereto attached and is in the words and figures following, to-wit:

54 In the Supreme Court of the State of Nebraska.

No. 15383.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES M. KYLE, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Nebraska:

The above named plaintiff in error complains that in the judgment, decision, record and proceedings in a certain cause pending in the Supreme Court of the State of Nebraska, in which the above

named plaintiff in error was appellant and James M. Kyle was appellee, which cause was decided and determined by the said Supreme Court of the State of Nebraska and judgment of affirmance therein rendered on December 14th, 1909, and in which a motion for a rehearing in said Court was thereafter filed by leave of court obtained, and overruled on the 23rd day of November, 1910, at which time the said judgment of said Court became final, which said Supreme Court of the State of Nebraska was the highest court of law or equity in which a decision or judgment could be had in said action, and in which action and the judgment and decision therein there was drawn in question the validity of a statute or an authority exercised under the State of Nebraska, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision therein was in favor of its validity, manifest error hap-
55 pened as appears from said judgment and decision and the record and in the assignment of errors herewith presented, to the great damage of the plaintiff in error.

Wherefore, the said plaintiff in error prays the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and for citation and supersedeas thereon, and your petitioner will ever pray.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By JAMES E. KELBY,
HALLECK F. ROSE,
Its Attorneys.

56 [Endorsed:] No. 15,383. In the Supreme Court of the State of Nebraska. C., B. & Q. R. R. Co. vs. James M. Kyle. Petition for writ of error. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay Clerk.

57 And on the same day, to-wit, 3rd day of December, 1910, there was filed in the office of the clerk of said supreme court, a certain Assignments of Error which said original assignments of error are hereto attached and are in the words and figures following, to-wit:

58 In the Supreme Court of the State of Nebraska.

No. 15383.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES M. KYLE, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, and respectfully submits that in the

record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled cause, there is manifest error in this, to wit:

Assignments of Error.

1. The said Supreme Court of the State of Nebraska erred in affirming the judgment of the District Court of Nebraska within and for Merrick County.

2. The said Supreme Court of the State of Nebraska erred in holding that the petition of plaintiff stated facts sufficient to constitute a cause of action or to sustain the judgment rendered in said District Court.

3. The said Supreme Court of the State of Nebraska erred in holding and deciding that the act of the legislature of the State of Nebraska, entitled "An act to regulate the carrying of live stock by railroads in the State of Nebraska, to fix a minimum rate of speed, and to provide damages for the violation of this act," approved March 30th, 1905, and being Chapter 107, Laws of Nebraska of 1905, pages 506 and 507; Compiled Statutes of Nebraska, Chapter 72, Article 1, Sections 10 and 11; Cobbey's Annotated Statutes of Nebraska, Sections 10,606 and 10,607, is a valid enactment
59 and not violative of nor repugnant to Article 14 of Amendments to the Constitution of the United States. The said legislative act is in its terms unreasonable, unequal, arbitrary and discriminatory and operates to deprive plaintiff in error of its property without due process of law, and to deprive appellant of the equal protection of the laws, and in each and every one of said particulars is violative of and repugnant to the provisions of the 14th Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The said Supreme Court of the State of Nebraska erred in holding, deciding and adjudging to be valid and not violative of Article 14 of Amendments to the Constitution of the United States, Section 2 of said Chapter 107 of the Laws of Nebraska of 1905, in the words following: "Section 2. Any individual, corporation or association of individuals violating any provisions of this act, shall pay to the owner of such live stock the sum of Ten Dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited, as liquidated damages, to be recovered in an ordinary action as other debts are recovered."

5. The said Supreme Court of the State of Nebraska erred in holding, deciding and adjudging to be valid and conclusive a legislative determination of the quantum or measure of damages flowing from the breach of a private contract for shipment of live stock in carload lots by railroad, and of the quantum or measure of damages sus-

tained by a private person for the failure to transport such
60 live stock at a prescribed minimum rate of speed, when such legislative act and determination of damages was wholly distinct and apart from the exercise of police power and not a punitive measure to enforce compliance with the commands of the statute. The provisions of said Chapter 107 of the Laws of Nebraska of 1905, which by the said judgment was held and determined to be valid as a legislative determination of the quantum or measure of damages assessed in favor of the defendant in error against plaintiff in error, was a usurpation of functions which are exclusively judicial, contrary to the law of the land and violative of and repugnant to the provisions of the 14th Amendment of the Constitution of the United States, prohibiting any state from depriving any person of life, liberty or property without due process of law, and is therefore void and of no effect.

Wherefore, the plaintiff in error prays that the judgment of the said Supreme Court of the State of Nebraska be reversed and judgment be rendered herein in favor of said plaintiff in error and for costs.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, *Plaintiff in Error.*
By JAMES E. KELBY,
HALLECK F. ROSE, *Its Attorneys.*

61 [Endorsed:] No. 15383. In the Supreme Court of the State of Nebraska. C. B. & Q. R. R. Co. vs. James M. Kyle. Assignment of Errors. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

62 And on the same day, to-wit 3rd day of December, 1910, there was rendered by said supreme court and entered of record upon the journal thereof a certain order allowing writ of error, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1910.

Dec. 3.

No. 15383.

JAMES M. KYLE, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Appeal from the District Court of Merrick County.

This cause coming on to be heard upon assignments of error and petition for a writ of error to the Supreme Court of the United States, by the Chicago, Burlington & Quincy Railway Company, appellant herein; upon due consideration whereof, it is ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed and that a citation be

directed to James M. Kyle, appellee herein, and defendant in error, for his due appearance in said Supreme Court of the United States.

M. B. REESE,
Chief Justice.

And on the same day, to-wit, 3rd day of December, 1910, there was filed in the office of the clerk of said supreme court, a certain writ of error, which said original writ of error is hereto attached and is in the words and figures following, to-wit:

63 The President of the United States to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a certain plea which is in the said Supreme Court of the State of Nebraska, before you or some of you, being the highest court of law or equity of said state in which a decision could be had in the said suit between the Chicago, Burlington & Quincy Railroad Company, defendant and plaintiff in error, and James M. Kyle, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said Chicago, Burlington & Quincy Railroad Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2nd day of January next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States
64 should be done.

Witness the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, the 3rd day of December, 1910.

GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska,
By J. H. McCLAY, *Deputy.*

[Seal United States Circuit Court, District of Nebraska, Lincoln Division.]

Allowed by
M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

O. K.
FAWCETT,
BARNES.

65 [Endorsed:] No. 15,383. In the Supreme Court of the State of Nebraska. C., B. & Q. R. R. Co. vs. James M. Kyle. Writ of error. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

66 And on the same day, to-wit, 3rd day of December, 1910, there was approved and filed in the office of the clerk of said supreme court a certain supersedeas bond, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 15383.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES M. KYLE, Defendant in Error.

Supersedeas Bond on Writ of Errors.

Know all men by these presents, that we, Chicago, Burlington & Quincy Railroad Company, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of Maryland and duly authorized to transact the business of writing surety bonds in the State of Nebraska, as surety, are held and firmly bound unto James M. Kyle in the sum of One Thousand Dollars ($1,000) to be paid to James M. Kyle, defendant in error, his representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of December, 1910.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of the State of Nebraska in the above entitled action.

Now, therefore, the conditions of this obligation are such that if the Chicago, Burlington & Quincy Railroad Company
67 shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and favor.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By HALLECK F. ROSE,
Its Attorney of Record in Said Case.
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By W. A. YONSON, *Its Attorney in Fact.*

The above and foregoing bond is hereby approved and it is ordered that the same operate as a supersedeas.

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 15383. Kyle v. C., B. & Q. R. Co. Supersedeas bond. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

And on the same day, to-wit, 3rd day of December, 1910, there was made to issue out of the office of the clerk of said supreme court a certain citation, which said original citation and acceptance of service is hereto attached and is in the words and figures following, to-wit:

68 In the Supreme Court of the State of Nebraska.

No. 15383.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES M. KYLE, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to James M. Kyle, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Chicago, Burlington & Quincy Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska, this 3rd day of December, 1910.

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

69 Service of the within citation and the receipt of a copy thereof, are hereby accepted and acknowledged this 3rd day of December, 1910.

GEORGE W. AYRES,
Attorney for James M. Kyle, Defendant in Error.

Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

[Endorsed:] In the Supreme Court of the State of Nebraska. No. 15,383. C., B. & Q. R. R. Co. vs. James M. Kyle. Citation. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

70 And on the same day, to-wit, 3rd day of December, 1910, said citation theretofore issued out of the office of the clerk of said supreme court was returned and filed in the office of said clerk with service endorsed thereon in the words and figures following, to-wit:

71 Service of the within citation and the receipt of a copy thereof, are hereby accepted and acknowledged this 3rd day of December, 1910.

GEORGE W. AYRES,
Attorney for James M. Kyle, Defendant in Error.

Endorsed: Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

72 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of James M. Kyle, appellee, vs. Chicago, Burlington and Quincy Railway Company, appellant, No. 15383, and also of the opinions of the Court rendered therein as the same now appears on file in my office.

I further certify that the foregoing petition for writ of error, the writ of error, the citation and acceptance of service thereof, are the originals which were lodged in my office.

In testimony, whereof I have hereunto set my hand and affixed the seal of said Court at my office in the city of Lincoln, Nebraska, this 24th day of December, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

73 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that there was lodged with me as such clerk on December 3, 1910, in the case entitled James M. Kyle, appellee, vs. Chicago, Burlington and Quincy Railway Company, appellant, No. 15383.

1. The original Bond of which a copy is herein set forth.
2. The copy of each of petition for writ of error, assignments of error, writ of error, citation.

In testimony, whereof I have hereunto set my hand and affixed the seal of said Court at my office in the city of Lincoln, Nebraska, this 24th day of December, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska.
By VICTOR SEYMOUR, *Deputy.*

74 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands *with* the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness, whereof I hereunto subscribe my name and affix the seal of said Supreme Court of Nebraska in the city of Lincoln, this 24th day of December, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska.
By VICTOR SEYMOUR, *Deputy.*

Costs of Suit.

Appellant's costs	$24.10
Appellee's costs	4.90
Cost of transcript	22.20

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

75 In the Supreme Court of the United States.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES M. KYLE, Defendant in Error.

Stipulation Designating the Parts of the Record to be Printed.

The parties hereto hereby stipulate that all that portion of the record, commencing on page 33 and ending on page 38, consisting of a motion for continuance, affidavit in support thereof, notice of hearing and proof of service, and motion for affirmance, proof of service

thereof, and the rulings of the court on said several motions; and all that portion of the record commencing on page 45 and ending on page 46, including a motion for withholding of mandate and the order of the court thereon, shall not be printed.

And that the entire record, with the exception of the parts above specifically designated shall be printed.

HALLECK F. ROSE,
JAMES E. KELBY,
Attorney- for Plaintiff in Error.
E. J. CLEMENTS AND
JNO. C. MARTIN,
Attorneys for Defendant in Error.

[Endorsed:] 838/22459.

76 [Endorsed:] File No. 22,459. Supreme Court U. S. October Term, 1910. Term No. 838. Chicago, Burlington & Quincy R. R. Co., Pl'ff in Error, vs. James M. Kyle. Stipulation as to parts of record to be printed. Filed January 16, 1911.

Endorsed on cover: File No. 22,459. Nebraska Supreme Court. Term No. 473. Chicago, Burlington & Quincy Railroad Company, plaintiff in error, vs. James M. Kyle. Filed December 30th, 1910. File No. 22,459.

9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 193

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILBUR I. CRAM.

No. 194

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES M. KYLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

JAMES E. KELBY,
JOHN F. STOUT, AND
HALLECK F. ROSE,
Counsel for Plaintiff in Error.

INDEX TO CHAPTERS.

TABLE OF CASES CITED.

GENERAL INDEX.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 193

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILBUR I. CRAM.

No. 194

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES M. KYLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

I.

Statement of the Cases.

The writs of error were sued out to review judgments of the Supreme Court of Nebraska, the highest court of the State, which adjudge to be valid and enforce against plaintiff

in error, chapter 107 of the Laws of Nebraska of 1905 (pp. 506, 507) as follows:

AN ACT to Regulate the Carrying of Live Stock by Railroad in the State of Nebraska, to Fix the Minimum Rate of Speed, and to Provide Damage for the Violation of this Act.

Be it enacted by the legislature of the state of Nebraska:

Section 1. It is hereby declared and made the duty of each corporation, individual, or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in said state in car load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled including the time of stops at stations or other points, provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each twelve miles of the distance, including the time of stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule.

Provided, further, that upon branch lines not exceeding 125 miles in length, live stock of less than six cars in one consignment each railroad company in this state may select and designate three days in each week as stock shipping days and publish and make public the days so designated, and after giving ten days' notice of the days so selected and designated, shall be required upon its branch lines to conform to the schedule in this act provided, only upon said days so designated as stock shipping days.

Section 2. Any individual, corporation, or association of individuals violating any provisions of this act shall pay to the owner of such live stock, the sum of ten dollars for each

hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered.

Approved March 30, 1905.

The issue was four times argued before the State Supreme Court, which twice delivered opinions. Upon all the hearings the court was divided in opinion. Both cases were heard together in the State Court on briefs filed in *Cram's case,* and the ruling and dissenting opinions were, in each instance, delivered in *Cram's case* (printed Record, pp. 78-87, 93-101). One memorandum opinion was filed in *Kyle's case* (printed Record, p. 23) but otherwise his case was disposed of by order entered at the same time as those entered in *Cram's case,* without delivery of any separate opinions. The records involve the same legal issue and for that reason are presented on the same brief.

Separate Statement of Cram's Case.

In *Cram's case,* the petition set forth twenty-five separate causes of action, each grounded solely on the Statute, and each based upon a separate car load shipment of live stock over the railroad of plaintiff in error from Burwell, Nebraska, to South Omaha, Nebraska, (printed Record, pp. 1-18). The form of statement in each cause of action was identical except as varied to cover the incidents of the dates, hours of departure and arrival, and time consumed in the different cases. Aside from formal averments each cause of action is stated in a single paragraph, the first cause (printed Record, p. 2) being as follows:

That, on the first day of July, 1905, the plaintiff delivered to the defendant, and it received, at its railroad station at Burwell, Nebraska, one car load of live stock, belonging to plaintiff, to be safely and securely conveyed by the defendant, over its said line of railroad, from Burwell to South Omaha, Nebraska, *within the time provided by statute,* in considera-

tion of the regular freight charges therefor which the plaintiff paid to the defendant; that the defendant's train conveying said car load of live stock left Burwell for South Omaha at 9 o'clock A. M. of said day but did not arrive at South Omaha, the point of destination, until 12:45 A. M. on July 3rd, 1905, and the time consumed in said journey was 24 hours and 3 minutes longer *than permitted by the statutes of Nebraska,* to the damage of the plaintiff in the sum of $240.00 *as provided for by statute.*

It will be noted that there is no averment that any actual injury or damage was done to or suffered by the shipper. Damages are claimed solely because "the time consumed in said journey was 24 hours and 3 minutes longer than permitted *by the statutes of Nebraska,* to the damage of the plaintiff in the sum of $240.00, *as provided for by statute.*"

Plaintiff in error questioned the constitutional validity of the statute counted on by demurrer (printed Record, p. 19) in which it assigned the following grounds:

1st. The petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

2nd. The statute law under which the plaintiff seeks to recover is null and void by reason of being unconstitutional, and a violation of the 14th article of the amendments to the Constitution of the United States, providing that, "No state shall deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3rd. The plaintiff seeks to recover property or money from the defendant without its consent and for the private use of the plaintiff, without compensation, and which recovery, if had, would amount to confiscation of the property of the defendant in violation of the provisions of article 14 of the amendments to the Constitution of the United States.

4th. The recovery sought by the plaintiff, if permitted, would be the recovery of a penalty under an act of the legislature which is penal in its character, and it is not such a right as the plaintiff can have or enforce in violation of section 5 article 8 of the Constitution of the United States.

May 9, 1906, the demurrer was overruled. Plaintiff in error excepted and was given 40 days to answer (printed Record, p. 20). The 7th and 8th paragraphs of the amended answer filed by plaintiff in error, upon which the case was tried (printed Record, pp. 27, 28) are as follows:

7th. The defendant alleges that in the first shipment of stock complained of by plaintiff, a written and printed contract was made, a copy of which is hereto attached and made a part of this answer marked exhibit "A", and that similar contracts were made between the plaintiff and the defendant for each of the several shipments of stock complained of, and among other terms of said contract it was specifically provided that the defendant railway company did not undertake to carry and deliver said stock within any specified time, nor agree that the said stock should arrive at destination for any particular market.

8th. The defendant further says that the law under which the plaintiff seeks to recover damages, arbitrarily fixes the amount and character of the recovery as a penalty and forfeiture for the private use of the plaintiff, and the defendant alleges that if recovery is had by the plaintiff under such law, it would be in violation of section 1 of article 14 of the amendments to the Constitution of the United States, in that it deprives the defendant of its property without due process of law and denies to it the equal protection of the laws and would involve the impairment of the obligations of the contract made between the plaintiff and defendant for the shipment of said stock in violation of paragraph 1, section 10, article 1, of the Constitution of the United States, and would be a violation also of the provisions of section 5 article 8 of the Constitution of the State of Nebraska, providing for the recovery and disposition of all fines, penalties and forfeitures.

Among other stipulations in the livestock shipping contract (printed Record, p. 31) is the following:

It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to

themselves or to each other, or which results from the nature or propensities of such animals, and that the Railway Company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

A reply consisting of a general denial (printed Record, p. 32) completed the issue, and on a trial to the court final judgment was entered against plaintiff in error for $1,640 and costs (printed Record, p. 36).

Plaintiff in error preserved its constitutional claims by assignments 5, 6, 7 and 8 of its motion for a new trial addressed to the trial court (printed Record, pp. 3, 4) as follows:

5. The amount of recovery in each shipment in this case is a penalty imposed on the defendant regardless of any loss or damage to the plaintiff, and such damage as a penalty cannot be sued for nor recovered by the plaintiff individually but if it could be enforced at all, it must be recovered as a fine or penalty and be appropriated to the school fund as is provided by the Constitution of the state, article 8 section 5.

6. The court erred in its findings and judgment in giving force and effect to the statute of the state assessing the penalty or liquidated damages in each one of the shipments complained of, because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damage to the plaintiff, and is an appropriation of the property of the defendant and confiscation of the same to the private use of the plaintiff without due process of law, and is a deprivation to the defendant of its property without due process of law and a denial to it of the equal protection of the law in violation of the provisions of the 14th article of the amendments of the Constitution of the United States, and also in violation of the bill of rights and Constitution of this state.

7. The findings and judgment of the court are an impairment of the obligation of the contracts of shipment entered into between the plaintiff and defendant, and a refusal to give effect to such contracts in violation of the provisions of the Constitution of the United States, section 10, article 1.

8. The findings and judgment of the court are a violation of the provisions of section 1 of article 14, of the amendments

of the Constitution of the United States in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, and are an appropriation of defendant's property to the plaintiff's private use, arbitrarily and in violation of said provisions of the Constitution of the United States.

The evidence, preserved by bill of exceptions and printed as part of the record, was directed solely to the matters of train movements and time consumed in the shipments. The shipper offered no evidence. There was therefore no evidence that the livestock had suffered any deterioration or that the shipper had suffered actual damage to the extent of a farthing.

The issue thus raised on the record was heard on appeal in the Supreme Court of Nebraska upon assignments contained in the brief of errors of plaintiff in error (printed Record, pp. 65, 66) which included, among others, the following:

6. The undisputed evidence shows that each of the shipments in question were transported by the defendant in reasonable time and without unnecessary delay, and the defendant company should not be held liable for any damage or penalty on account of any of said shipments, all of which were made on contracts fairly entered into between the plaintiff and defendant upon the agreement of the parties that the company did not undertake to carry said shipments within any specified time nor for any particular market.

7. The findings and judgment are erroneous because there was no fault nor violation of any duty on the part of the defendant company in carrying any of said shipments according to the rules, laws and usages governing common carriers of live stock which was all the duty imposed upon the defendant by the laws and Constitution of the state of Nebraska.

8. The amount of the recovery in each shipment in this case is a penalty imposed on the defendant regardless of any loss or damage to the plaintiff, and such damage as a penalty cannot be sued for nor recovered by the plaintiff individually, but if it could be enforced at all, it must be recovered as a fine or penalty and be appropriated to the school fund as is provided by the Constitution of the state, article 8, section 5.

9. The court erred in its findings and judgment in giving force and effect to the statute of the state assessing the penalty or liquidated damages in each one of the shipments complained of, because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damage to the plaintiff, and is an appropriation of the property of the defendant and confiscation of the same to the private use of the plaintiff without due process of law and a denial to it of the equal protection of the law in violation of the provisions of the 14th article of the amendments of the Constitution of the United States, and also in violation of the Bill of Rights and Constitution of this state.

10. The findings and judgment of the court are an impairment of the obligation of the contracts of shipment entered into between the plaintiff and defendant, and a refusal to give effect to such contracts in violation of the provisions of the Constitution of the United States, section 10, article 1.

11. The findings and judgment of the court are a violation of the provisions of section 1, of article 14, of the amendments of the Constitution of the United States, in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, and are an appropriation of defendant's property to the plaintiff's private use arbitrarily and in violation of said provisions of the Constitution of the United States.

12. An Act of the legislature of the State of Nebraska under which appellee seeks to maintain the said cause of action and judgment against this appellant is unconstitutional and void, being an attempt to appropriate the property of one person to the private use of another in the nature of penalties and fines, in violation of article 8, section 5, of the Constitution of the State of Nebraska.

13. The law passed by the legislature of the State of Nebraska upon which the judgment herein rests, is unconstitutional and void, being in direct violation of section 1, of article 14 of the Amendments to the Constitution of the United States in that it deprives the appellant of its property without due process of law and denies to it the equal protection of the laws, and in violation of section 10 of article 1 of the Constitution of the United States, because it impairs the obligation of the contracts for shipment of stock as set forth in the appellee's petition and claims as shown and proved on the trial.

June 11, 1909, after the case had been twice argued, the State Supreme Court entered judgment of affirmance, upon an opinion by ROOT, J., overruling the constitutional claims set up by plaintiff in error, and adjudging the statute assailed to be valid (printed Record, pp. 78-87), conditioned upon the shipper's filing a remittitur of $240. The condition was complied with (printed Record, p. 88).

Subsequently the court entertained a motion for a rehearing (printed Record, pp. 88-90), in which plaintiff in error made among others, the following assignments:

3. The judgment of the District Court is not sustained either by the pleadings or evidence in so far as it rests upon any one of the twenty-five several causes of action set forth in the petition.

4. The petition of appellee does not state facts sufficient to constitute a cause of action, nor are the facts separately alleged in any one of the twenty-five causes of action sufficient to constitute a cause of action.

9. The court erred in determining to be valid chapter 107, laws of Nebraska 1905 sections 10606 and 10607, Cobbey's Annotated Statutes of 1907. The said statute is unreasonable, arbitrary and discriminatory and operates to deprive appellant of its property without due process of law, to deprive appellant of equal protection of the laws, in which respects it is violative of the provisions of article fourteen of Amendments to the Constitution of the United States and, therefore, null and void.

10. The said statute is violative of sections 11 and 15 of article 3 and of section 5 of article 8 and of section 4 of article 11 of the Constitution of the State of Nebraska, and for that reason is null and void.

11. The court erred in holding that appellant in questioning the validity of the said statute as violative of the constitutional provision that the liability of railroad corporations as common carriers should never be limited was attempting to litigate a shipper's rights in a hypothetical case. If the law on its face be violative of any provisions of the State Constitution and for that reason void an adjudication to that effect would necessarily exonerate appellant from all liability in the present action; and in litigating the issue of liability this

defendant has the same standing and right to invoke the provision of the Constitution as would a shipper claiming damages in excess of that provided by the statute.

Upon a reargument the Court entered an order sustaining its former judgment of affirmance (printed Record, p. 92) upon an opinion delivered by DEAN, J. (printed Record, pp. 93-102. Thereupon leave was granted plaintiff in error to file a second motion for a rehearing (printed Record, p. 105). The second motion for a rehearing assigned among others the following grounds (printed Record, pp. 106-108):

1. The court erred in adhering to its former judgment rendered June 11th, 1909.

3. The court erred in holding that chapter 107, laws of Nebraska, 1905, Cobbey's Annotated Statutes, sections 10606 and 10607, is a valid legislative enactment. Said statute is void for the following reasons:

(a) It is violative of section 4 of article 11 of the Constitution of Nebraska, providing that the liability of railroads as common carriers shall never be limited.

(b) It is violative of section 5 of article 8 of the Constitution of Nebraska, providing that all penalties shall be appropriated exclusively to the use and support of the common schools.

(c) It is violative of article 2 of the Constitution of Nebraska, distributing the powers of government, and providing that no person or collection of persons being one of the departments of government, shall exercise any power properly belonging to either of the others.

(d) It is violative of section 1 of article 6 of the Constitution of Nebraska, conferring all the judicial power of the State upon the Courts of Justice.

(e) It is violative of section 3 of article 1 of the Constitution of Nebraska, providing that no person shall be deprived of life, liberty or property without due process of law.

(f) It is violative of section 11 of article 3 of the Constitution of Nebraska, providing that no law shall be amended unless the new act shall contain the section or sections so amended and the section or sections so amended shall be repealed.

(g) It is violative of section 15 of article 3 of the Consti-

tution of Nebraska, prohibiting special legislation, in that it regulates the practice of courts of justice in respect to assessment of damages in a special class of cases only, and its provisions are special where a general law could be made applicable.

(h) It is violative of article 14 of Amendments to the Constitution of the United States, in that it is unreasonable, arbitrary, and discriminatory, and operates to deprive appellant of its property without due process of law, and to deprive appellant of the equal protection of the laws.

8. The court erred in holding that it is within the power of the legislative branch of the Government to determine and liquidate the measure of damages and fix the compensation to be awarded by the courts of justice in favor of a shipper against a railroad company for each hour of delay in transporting live stock. The legislative attempt to do so is a usurpation of power which the Constitution delegates exclusively to the courts.

9. The court erred in holding that the quantum or measure of damages caused by delay in transporting stock is attended with any special or peculiar difficulty of proof, and because thereof is a legitimate subject of political or legislative policy to be liquidated by legislative enactment with like effect as if done by contract of the parties. Appellant says the law is, to the contrary, that the actual damages in such cases are of ready and convenient proof and definite and certain in amount; and the common-law rule of actual compensation, adopted by the people and embodied in section 4 of article 11 of the State Constitution, is the exclusive rule of liability of railroads in such cases and is binding and obligatory upon the legislature, the courts and the contracting parties.

Upon argument the second motion for a rehearing was overruled (printed Record, pp. 108, 109); and thereupon plaintiff in error sued out this writ of error to the Supreme Court of Nebraska and filed therein (printed Record, pp. 111, 112) the following:

Assignment of Errors.

1. The said Supreme Court of the State of Nebraska erred in affirming the judgment of the District Court of Nebraska within and for Garfield County.

2. The said Supreme Court of the State of Nebraska erred in holding that the petition of plaintiff stated facts sufficient to constitute a cause of action or to sustain the judgment rendered in said District Court.

3. The said Supreme Court of the State of Nebraska erred in holding and deciding that the act of the legislature of the State of Nebraska, entitled "An act to Regulate the Carrying Livestock by Railroads in the State of Nebraska, to Fix a Minimum Rate of Speed, and to Provide Damages for the Violation of this Act," approved March 30, 1905, and being chapter 107, Laws of Nebraska of 1905, pages 506 and 507; Compiled Statutes of Nebraska, chapter 72, article 1, sections 10 and 11; Cobbey's Annotated Statutes of Nebraska, sections 10,606 and 10,607, is a valid enactment and not violative of nor repugnant to article 14 of Amendments to the Constitution of the United States. The said legislative act is in its terms unreasonable, unequal, arbitrary and discriminatory and operates to deprive plaintiff in error of its property without due process of law, and to deprive appellant of the equal protection of the laws, and in each and every one of said particulars is violative of and repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The said Supreme Court of the State of Nebraska erred in holding, deciding and adjudging to be valid and not vio-

lative of article 14 of Amendments to the Constitution of the United States, section 2 of said chapter 107 of the Laws of Nebraska of 1905, in the words following: "Section 2. Any individual, corporation or association of individuals violating any provisions of this act, shall pay to the owner of such live stock the sum of Ten Dollars, for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited, as liquidated damages, to be recovered in an ordinary action as other debts are recovered."

5. The said Supreme Court of the State of Nebraska erred in holding, deciding and adjudging to be valid and conclusive a legislative determination of the quantum or measure of damages flowing from the breach of a private contract for shipment of live stock in carload lots by railroads, and of the quantum or measure of damages sustained by a private person for the failure to transport such live stock at a prescribed minimum rate of speed, when such legislative act and determination of damages was wholly distinct and apart from the exercise of police power and not a punitive measure to enforce compliance with the commands of the statute. The provisions of said chapter 107 of the Laws of Nebraska of 1905, which by the said judgment was held and determined to be valid as a legislative determination of the quantum or measure of damages assessed in favor of defendant in error against plaintiff in error, was a usurpation of functions which are exclusively judicial, contrary to the law of the land and violative of and repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States, prohibiting any State from depriving any person of life, liberty or property without due process of law, and is therefore void and of no effect.

Separate Statement of Kyle's Case.

In *Kyle's case,* the petition (printed Record, pp. 2, 3) alleged the shipment of 100 head of cattle over the railroad of plaintiff in error in five cars from Palmer, Nebraska, to South Omaha, Nebraska, "and that the time used by said defendant in conveying said cattle on said train and over said line of railroad was negligently, unnecessarily and unlawfully prolonged for a period of nine hours *over the time allowed by law in that behalf,* and over the time that was reasonably necessary for that purpose." The *ad damnum* averment was that by failure to transport the cattle "within a reasonable time *and within the time allowed by law for that purpose,* the plaintiff's damage has been in the sum of $450," which is the statutory rate of $10 per hour for the alleged nine hours delay of each of the five cars in question.

The answer filed by plaintiff in error to Kyle's petition averred that the shipment was made pursuant to a contract in writing, and was made as contracted for without fault, negligence or delay on its part, and denied all allegations of the petition, except as confessed therein (printed Record, pp. 3, 4).

At the trial Kyle offered his own testimony and was the only witness called by either party. The entire evidence and oral proceedings, as embodied in the bill of exceptions, is so brief that we here reproduce it from pages 14 to 17 of the printed Record:

Mr. JAMES M. KYLE, being first duly sworn in behalf of the plaintiff and examined in chief by Mr. Geo. W. Ayres, testifies as follows:

Q. State your name and place of residence? A. Name is James Kyle. I live at Palmer.

Q. How long have you lived in Palmer or vicinity? A. Eight years this spring.

Q. What is your occupation? A. Farming, cattle feeder, generally mixed business, farming and stock raising.

Q. Did you have any business transactions with the defendant the Chicago, Burlington and Quincy Railway on the 6th day of September, 1905? A. Yes, I shipped some cattle that day.

Q. How many cattle were there in this shipment? A. One hundred head.

Q. In how many cars were they shipped? A. Five cars.

Q. Were they shipped in car load lots? A. Yes, twenty in each car.

Q. Did you pay the defendant for shipping the cattle? A. Yes, at Chicago.

Q. Did you accompany the cattle? A. Yes.

Q. At what time did the train carrying these cattle leave Palmer, Nebraska, if you know? A. About five o'clock. Their own statement shows 5:20.

Q. At what time did it reach the stock yards at South Omaha, Nebraska? A. Sometime near one o'clock.

Q. Do you know the distance from Palmer, Nebraska, to South Omaha, Nebraska, on the defendant line over which these cattle were shipped? A. I think the distance is 164 miles.

Q. You are satisfied that that is the distance, are you? A. Yes.

Q. Who was the owner of these cattle? A. I was the owner.

Q. To whom consigned? A. Clay, Robinson and Company.

Q. For what purpose were they consigned to Clay, Robinson & Company? Objected to as incompetent and immaterial. Overruled. Exception. A. To sell for me.

Q. Do you know how much time was consumed in setting out, loading and unloading stock at stations between Palmer, Nebraska, and South Omaha, Nebraska, by the train on which your cattle were shipped? Objected—as incompetent, immaterial under the issues. Overruled. Exception. A. I do not exactly.

Q. Are you able to state about what time? A. I think something like one hour. Objected to as incompetent and being the conclusion of the witness, not responsive. Overruled, exception.

Q. Will you say that it was not more than one hour? Objected to as leading. Sustained.

Q. How long have you been engaged in the business of feeding and shipping cattle, Mr. Kyle? A. A little better than 20 years.

Q. Have you shipped cattle to the Stock Yards at South Omaha, Nebraska, prior to this shipment? A. I have.

Q. You may state to the jury what were the facts regarding these cattle reaching South Omaha, in time to be sold on the market that day? Objected to as incompetent and immaterial under the issues in this case and calling for a conclusion of the witness. Sustained. Exception.

By the COURT: I didn't understand the date of their arrival at South Omaha. Was it by night or by day?

—. It was on September 7th, the following day at about one o'clock in the afternoon.

Q. Now Mr. Kyle are you able to fix the time that you know the defendants were engaged in setting out, or taking on stock trains between Palmer, Nebraska, and South Omaha? A. Yes, I am certain that I do.

Q. Well what time do you fix the time at? Objected to as incompetent, immaterial, the witness not having shown himself qualified to answer under the issues in this case. Sustained.

Q. State how much time, if you know, was consumed by the defendants on the trip from Palmer, Nebraska, to South Omaha, in taking on stock and setting out stock between Palmer, Nebraska, and South Omaha, Nebraska? You may state ——. State as near as you can. Objected to as incompetent under the issues in this case and witness is not qualified to answer. Overruled. Exception. A. My recollection is that there was very little stock taken on. The train was mostly dead freight. It has been a good while and I can't say the amount of stock taken on or the length of time it took. But it laid for hours at a time.

Defendant moves to strike out the last answer of the witness as incompetent and as a conclusion of the witness. Overruled. Exception.

Defendant moves to strike out that last part where he remarks that "it laid for hours at a time," as being incompetent and as a conclusion of the witness and the witness not qualified to answer. Overruled. Exception.

Q. You testified that you accompanied the train? A. Yes.

Q Are you able to state approximately the time taken by this train on taking on and setting off or unloading and loading stock between Palmer, Nebraska, and South Omaha? Objected to as incompetent, immaterial under the issues in this case. Overruled. Exception.

Q. Are you able to state approximately? A. Yes.

Q. You may state? Objected to as incompetent and immaterial under the issues in this case. Overruled. Exception.

Q. State? A. I think it was one hour. My idea was one hour. Approximately one hour.

Q. Is that right as near as you can remember? Objected to as incompetent, immaterial and calling for a conclusion of the witness and witness not being qualified. Overruled, exception.

No cross-examination.

Plaintiffs rests. Defendant rests.

The defendant moves the Court to direct a verdict for the defendant because on the issues joined and evidence introduced in this case, the plaintiff is not entitled to recover.

Overruled. Exception.

It is thus shown that there was neither pleading nor proof that the cattle deteriorated in shipment or that any actual injury or damage had been done to the shipper. The statute assailed was the sole and only basis of the claim in suit.

The plaintiff tendered two instructions (printed Record, p. 7) which with the record of refusal and exception, are as follows:

1. The jury are instructed that on the issues joined and the evidence introduced in this case, the plaintiff is not entitled to recover, and you are therefore instructed to return a verdict in favor of the defendant.

Tendered by Defendant, refused. Defendant excepts. James G. Reeder, Judge.

2. The jury are instructed that the plaintiff is not entitled to recover Ten Dollars per car, or any other sum as a penalty under the statute of Nebraska, for failing to move the shipment of said stock at the rate provided for by the statute on the branch lines used in said shipment.

Tendered by Defendant, refused. Defendant excepts. James G. Reeder, Judge.

The trial judge enforced the terms of the statute by instructions (printed Record, pp. 6, 7) which, with the record of exceptions, are as follows:

5th. You are instructed that section 122 "A" of the compiled Statutes of Nebraska provides as follows:

It is hereby declared and made the duty of each corporation, individual or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska in transporting live stock from one point to another in said state in car load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled including the time of stops at stations or other points.

The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required as provided in this Schedule.

And that section 122 "B" of the Compiled Statutes of Nebraska provided as follows:

Any individual, corporation, or association of individuals, violating any provisions of this act shall pay to the owner of such live stock, the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered. That both of said sections of our statutes were in force at the time of the shipment of said cattle.

Defendant excepts. James G. Reeder, Judge.

To warrant you in returning a verdict for the plaintiff in this cause he must establish by a preponderance of the evidence the following facts:

First. That on or about the date mentioned in this petition, he shipped five cars of cattle from Palmer, Nebraska, consigned to parties in South Omaha, Nebraska.

Defendant excepts. James G. Reeder, Judge.

Second. That said cattle were shipped over a line of the road owned or operated by the defendant.

Third. That the time consumed by the defendant in transporting said cattle from Palmer, Nebraska, to South Omaha, Nebraska, exclusive of time consumed in picking up, setting out, loading and unloading stock at stations, exceeded one hour for each 18 miles of travel between said Palmer and said South Omaha.

Defendant excepts. James G. Reeder, Judge.

Fourth. If you find that the time consumed did exceed

one hour for each 18 miles of distance between said points exclusive of the time consumed in picking up and setting out, loading and unloading stock at intervening stations, then and in that case you should, in making up your verdict, allow the plaintiff the sum of $10 per car for each hour the time consumed in said shipment exceeds 18 miles per hour for the said shipment, together with interest from the 7th day of September, 1905, to the present time.

Defendant excepts. James G. Reeder, Judge.

Fifth. If you find from the evidence that the time consumed by the defendant in transporting said cattle between Palmer, Nebraska, and South Omaha, Nebraska, excluding time consumed in picking up, setting out, loading, and unloading at intervening stations did not exceed one hour for each 18 miles of travel between said stations, then and in that case your finding and verdict should be for the defendant.

Defendant excepts. James G. Reeder, Judge.

The jury returned a verdict for the sum claimed with interest, $504.25 (printed Record, p. 9). The plaintiff in error moved for a new trial (printed Record, pp. 9-11) and in its motion assigned for error: the overruling of its motion for a directed verdict; the refusal of each of the several instructions by it tendered; the giving of each of the instructions above quoted; and the submission to the jury of a claim of liability based on an unconstitutional and void statute. And in addition to the foregoing, plaintiff in error, within the three days in which its right to move for a new trial was *absolute*, filed an amendment thereto, specifying the constitutional objections to the state statute in question (p. 11) as follows:

1st. The amount of the recovery is based upon a penalty imposed upon the defendant regardless of any loss or damage to the plaintiff and such damage as a penalty cannot be sued for nor recovered by the plaintiff individually, and if it could be enforced and recovered at all it must be recovered as a fine or penalty to be appropriated to the school fund as is provided by the Constitution of the State, article 8, section 5.

2nd. The court erred in its findings and judgment in giving force and effect to the statute of the State assessing the penalty or liquidated damages in the shipment complained

of because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damages to the plaintiff, and is an appropriation of the property of the defendant and confiscation of the same to the private use of the plaintiff without due process of law, and is a deprivation to the defendant of its property without due process of law, and denial to it of the equal protection of the law in violation of the provisions of the Fourteenth article of the Amendments of the Constitution of the United States, and also in violation of the bill of rights and constitution of this state.

3rd. The findings and judgment of the court are a violation of the provisions of section 1 of article 14 of the Amendments of the Constitution of the United States in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, and are an appropriation of the defendant's property to the plaintiff's private use arbitrarily and in violation of said provisions of the Constitution of the United States.

The trial court entertained the motion including the amendment by specific reference, and by its order overruled the same and entered judgment on the verdict for $504.25 and costs (printed Record, pp. 11, 12).

On appeal before the State Supreme Court the plaintiff in error made, among others (printed Record, pp. 19, 20) the following assignments of error:

4. The instructions and judgment are erroneous because there was no fault nor violation of any duty on the part of the defendant company in carrying said shipments, according to the rules, laws and usages governing common carriers of live stock, which was all the duty imposed on the defendant by the laws and constitution of the State of Nebraska.

5. The amount of the recovery in this case is a penalty imposed upon the defendant regardless of any loss or damage to the plaintiff, and such damage as a penalty cannot be sued for nor recovered by the plaintiff individually, but if it could be enforced at all, it must be recovered as a fine or penalty and be appropriated to the school fund as is provided by the Constitution of the State of Nebraska, article 8, section 5, and the act of the legislature under which appellee seeks to

maintain said cause of action and judgment against this defendant is therefore unconstitutional and void.

6. The court erred in its instructions and judgment in giving force and effect to the statute of the state assessing the penalty or liquidated damages in this shipment because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damage to the plaintiff and is an appropriation of the property of the defendant, and confiscation of the same, to the private use of the plaintiff without due process of law, and is a denial to it of the equal protection of the law in violation of the provision of the Fourteenth article of the Amendments to the Constitution of the United States, and also in violation of the bill of rights and Constitution of this State.

7. The instructions and judgment of the court are an impairment of the obligation of the contract of shipment entered into between the plaintiff and defendant and a refusal to give effect to such contract in violations of the provision of the Constitution of the United States, section 10, article 1.

12. The court erred in giving its first instruction.

13. The court erred in giving its second instruction.

14. The court erred in giving its third instruction.

15. The court erred in giving its fourth instruction.

16. The court erred in giving its fifth instruction.

17. The court erred in giving the first subdivision of its fifth instruction.

18. The court erred in giving the second subdivision of its fifth instruction.

19. The court erred in giving the third subdivision of its fifth instruction.

20. The court erred in giving its fourth subdivision of its fifth instruction.

21. The court erred in giving its fifth subdivision of its fifth instruction.

The first motion for a rehearing filed in the State Supreme Court, which was entertained and ruled on (printed Record, pp. 24, 25), contained, among others, the following assignment:

2. The court erred in determining to be valid, chapter 107, Laws of Nebraska, 1905, sections 10606 and 10607, Cobbey's Annotated Statutes of 1907. The said statute is unreasonable, arbitrary and discriminatory, and operates to deprive appellant of the equal protection of the laws, and to deprive appellant of its property without due process of law, in which respects it is violative of the provisions of article 14 of Amendments to the Constitution of the United States and, therefore, null and void.

The second motion for a rehearing in the State Supreme Court, filed by leave of court, entertained and ruled on (printed Record, pp. 26-28) assigned the constitutional objections in the same language as that contained in the corresponding motion in *Cram's case,* already copied into this statement. The assignment of errors on which the present writ of error in *Kyle's case* was sued out, are also identical with the assignments in *Cram's case,* already copied in this statement, and we here refer to the assignment of errors embraced in the statement of *Cram's case* as those upon which plaintiff in error relies in *Kyle's case.* The record, in both cases, therefore, throw upon this court the duty of determining whether, upon its face, chapter 107 of the Laws of Nebraska of 1905, violates the requirements of due process, and equal protection of the laws embodied in the Fourteenth Amendment of the Constitution of the United States.

II.

The Statute of Nebraska in question, so far as it creates a determinate and measured pecuniary liability against railroad companies in favor of shippers of live stock in car load lots, of $10 per car per each hour consumed in transportation over a specified speed schedule, is not a punitive measure, and cannot be upheld as an exercise of the police power.

The Supreme Court of the State construed the statute to be a mere legislative admeasurement and judgment, determining and liquidating the amount of pecuniary recovery by a stock shipper in car lots against railroads who failed to attain a specified rate of speed during the whole course of transportation.

The construction given to the statute by the highest court of the state must be accepted by this court in judging whether the statute conforms to the Constitution of the United States. (*Cargill Co. v. Minnesota,* 180 U. S., 452, 467; *Tullis v. Lake Erie & W. R. Co.,* 175 U. S., 348, 353; *Missouri P. R. Co. v. Nebraska,* 164 U. S., 403, 414; *Illinois C. R. Co. v. Illinois,* 163 U. S., 142, 152; *Chicago, M. & St. P. R. Co. vs. Minnesota,* 134 U. S., 418, 456; *Gatewood v. North Carolina,* 203 U. S., 531, 541.)

Upon an original and independent inquiry this court might be constrained to hold the imposition of ten dollars per car for each hour of delay punitive in character, intended to stimulate exertion to conform to the statutory speed schedule. That view was urged by counsel, without success, before the state court, in an effort to bring the statute within the condemnation of the constitution of Nebraska. The state court agreed with counsel that if the imposition was penal in character, it would be void because forbidden by the state constitution.

Under the rule which binds this court to the construction of the statute held by the state court, we assume the first

inquiry here will be as to the interpretation placed on the statute by the state court. The imposition was upheld purely as a legislative liquidation of damages, and not as a penalty. To this effect the state supreme court in its opinion (printed Record, p. 82) said:

> Before the enactment of this statute the carrier was liable in damages to the shipper if it unnecessarily and unreasonably delayed the transportation of live stock committed to its possession for carriage. * * * It is a matter of common knowledge that live stock confined in a freight car deteriorates in condition and that, if the animals are to be placed on the market within a short time of the termination of the transportation, the depreciation is not confined to a shrinkage in weight, but to many other factors difficult to prove, but actually existing and seriously affecting the market value of said property. As the damage accruing from the protracted confinement of stock is difficult to prove with reasonable *exactitude*, and yet always exists, the legislature has the power to provide for liquidated damages. Such legislation is not unsound in principle and has been upheld in many courts.

The language of the state court leaves no room for doubt. It holds that the measurement of damages for a private wrong is the proper subject of legislative enactment, and is not, exclusively, a judicial function. It holds that legislative liquidation of the compensation in damages recoverable by a private suitor is binding on the courts, and is not a disregard of the guaranty of due process contained in the Fourteenth Amendment of the Constitution of the United States. Necessarily, that holding precludes any justification of the statute as a police measure, or a penal or punitive imposition. If the damages imposed are compensatory, only, they cannot be penal. If the issue were open they might be held to be either compensatory or penal; but they cannot be held to be both compensatory and penal.

But the court specifically rejected the argument of counsel that the imposition was penal, and in declining to so adjudge (printed Record, p. 83) said:

Counsel for defendant argue that the statute *purports to give more than compensatory damages,* and therefore is controlled by *Railroad Company v. Baty,* 6 Neb. 37; but that case merely disapproved a statute that purported to give *double damages,* and if the act under consideration provided for the recovery of *double or treble damages,* we would not hesitate to apply the earlier case to the instant one. Such is not the case. On more than one occasion we have upheld the right of the legislature to liquidate damages that may arise from the default of a person under circumstances which preclude the ascertainment of *actual damages suffered by the aggrieved person.*

In thus rejecting the argument that the imposition of the statute is penal; the court tenaciously reasserts the construction that the statute merely liquidates and measures the "actual damages suffered by the aggrieved person." The rejection of the construction that the imposition was penal, and the adoption of the construction that it was a mere liquidation of damages actually suffered "by an aggrieved person"—*compensatory* as contradistinguished from *penal*—enabled the court to uphold the statute as consistent with the state constitution. The above quotations are from the ruling opinion on the points involved. There was a reargument and a subsequent opinion. but the reargument was by the court's order limited to a question of pleading, and to one provision of the state constitution, and the subsequent opinion was limited to these two questions. (Printed Record, pp. 90, 93.)

The significance of the construction put upon the statute in question by the highest court of the state will be apparent, when it is known that the constitution of Nebraska, as interpreted by that court, limits recoveries in favor of private suitors to *compensatory* damages in all cases, and forbids all *penal* and *punitive* impositions for the use of private suitors. The decisions under review adhere to this settled doctrine. If the imposition of ten dollars per car for each hour of delay had been construed as a penalty,

the act in question would, admittedly, have been adjudged void for want of power in the state legislature to make the punitive imposition in favor of a private suitor.

It is conceded that the guaranties of due process and the equal protection of the laws, contained in the Fourteenth Amendment, do not abrogate the police powers of the states. The limitation of the police powers of the state of Nebraska which forbids punitive recoveries in favor of private suitors, in all cases, is not a restraint imposed by the Fourteenth Amendment. It is self-imposed, but has been enforced rigorously and without deviation or exception ever since the adoption of the state constitution. Being a local rule, this court has neither power nor disposition to overturn it, nor to substitute, as a rule of local jurisprudence, the practice of assessing punitive damages in favor of private suitors, by way of punishment. This court accepts, without question, the rules of local jurisprudence expressed by the state constitution, as interpreted by the highest court of the state.

Since this court must adopt the local interpretation of the statute in question, and adjudge with reference to that interpretation whether it conforms to the requirements of due process and the equal protection of the laws, it is appropriate to present the provisions of the state constitution and the decisions construing them. They will definitely establish the preliminary point that this court must, because of the local law of the state, lay aside any consideration of the police power of the state, as a justification of the imposition of ten dollars per car for each hour of delay in shipment. That ground of justification for the imposition does not exist in Nebraska, and is there definitely repudiated.

The guaranty of the Magna Charta that no freeman shall be taken or imprisoned or disseized unless by the lawful judgment of his peers, or by the law of the land, is preseved in section 3 of the Bill of Rights of the Constitution of Nebraska as follows:

Sec. 3. No person shall be deprived of life, liberty or property without due process of law.

The guaranty of the Magna Charta that, "We will sell to no man, we will not deny to any man, either justice or right," is preserved in section 13 of the Bill of Rights of the Constitution of Nebraska, as follows:

Sec. 13. All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.

Article 2 of the Constitution of Nebraska, distributing the powers of government, is as follows:

Section 1. The powers of the government of this State are divided into three distinct departments: the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Article 3 of the Constitution, section 1, is as follows:

Section 1. The legislative authority is vested in a Senate and House of Representatives.

We refer to article 3 in order to challenge attention to the fact that judicial functions are not elsewhere conferred upon the legislature within the excepting clause "except as hereinafter expressly directed or permitted," other than to be judge of election returns and qualifications of its members, and like matters incident to the proceedings of a deliberative assembly. Neither the joint assembly not either house can try or determine an impeachment of a state officer, that function being referred to the judiciary by section 14 of article 3. By article 6, the judicial power of the state is vested in the courts.

The first Constitution of the State (1866) did not contain

the due process provision. But the Bill of Rights of the original Constitution concluded: "Sec. 20. This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." *Mason*, Ch. J., in holding (*Bradshaw v. Omaha*, 1 Neb. 37) that the guaranty of due process was retained to the people under the first Constitution, said:

> I have no doubt that the benefit of that clause from Magna Charta is retained to us under our Constitution, if not by special provision, at least by the general terms of section twenty of the Bill of Rights; for unquestionably it is a fundamental doctrine of liberty as held in modern times. 2 Sullivan's Lectures, 243 et pas.; Chancellor Kent in *Gardner v. Newberg*, 2 John Ch. 162.

Soon after adoption of the Nebraska Constitution of 1875, and at the October, 1877, term, the Supreme Court of the State gave a construction to the due process provision embodied in section 3 of the Bill of Rights of that instrument, which has ever since been maintained and followed (*Atchison & N. R. Co. v. Baty*, 6 Neb. 37-47). The operation of this clause of the Constitution, as then interpreted by the Court of final authority upon the meaning of that instrument, was held to definitely prohibit the courts of the state from assessing any punitive awards or recoveries, in any case, in favor of one private suitor against another, notwithstanding specific legislative enactments and directions so to do. In a well considered opinion which has been many times cited approvingly by other courts, including this court, the court maintained the independence of the judiciary and its supremacy within its own department, and declined to submit to the degradation of becoming a mere ministerial functionary to execute legislative judgments and decrees. The opinion of the court enumerates the powers of *taxation, eminent domain*, and *punishment* imposed in the administration of the criminal jurisprudence, as the only instances in which the constitutional guaranties of the right of property may be made to yield to the power of the government.

The court in that case (*R. Co. v. Baty,* 6 Neb. 37) had under consideration the validity of a statute awarding to the owner under a stated contingency, double the value of property injured, killed or destroyed on a railroad track. The grounds upon which the court held the act invalid were stated in the opinion by GANTT, J., as follows:

The design of the Constitution, then is to protect the absolute rights of individuals, as well as to establish the framework of the political government, and define its limitations—wherefore it is called the supreme law of the land. It is, nevertheless, true that under the police regulations of civil society, property may be regulated so as to protect others from injury in the use of it. The maxim is, sic utere tuo ut alienum non loedas, and therefore however absolute and unqualified may be the title of the owner of private property, he holds it under the implied liability that his use of it shall not be injurious to others, nor to the rights of the community; but this does not infringe the right of or title to property.

This common law right of property is secured by our Constitution. It declares that "no person shall be deprived of life, liberty, or property, without due process of law." The terms "due process of law" and "the law of the land"—one or the other of which is found in all Constitutions of the States—are said to mean the same thing; and it is quite clear that they are indifferently used in Constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. *State v. Dohety,* 60 Me., 509. *Norman v. Heist,* 5 W. and S., 171. *The State v. Simons,* 2 Spears, 767. Hence, these two terms do not mean merely a legislative enactment, for, "if they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and his life, without crime. Yet all this he may suffer, if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons be in itself the law of the land within the sense of the Constitution." *Hoke v.*

Henderson, 2 Dev., 15. Webster interprets these terms to mean "that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered as the law of the land;" and he says, if this were so, "acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in every possible form would be the law of the land. There would be no general permanent law for the courts to administer, or even to live under. The administration of justice would be an empty form—an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law, or administer the justice of the country." 5 Webster's Works, 487. *State v. Doherty*, 60 Me., 509. *James' Heirs v. Perry*, 11 Mass., 404. *Lane v. Dorman*, 3 Scam., 240-1. *Commonwealth v. Bryne*, 20 Gratt., 165. *Bank of Columbia v. Okeley*, 4 Wheat., 243.

It is, however, true that, subject to the qualified negative of the governor, the legislature possesses all the legislative power of the state; but as it is said in *Taylor v. Porter*, 4 Hill, 144, "under our system of government the legislature is not supreme. It is only one of the organs of absolute sovereignty which resides in the whole body of the people," and, therefore, as the "security of life, liberty, and property lay at the foundation of the civil compact, to say that the grant of legislative power included the right to attack private property would be equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which government was established." Smith's Const. Law, 484. This one great end of government is the protection of the absolute right of individuals—the life, liberty and property of each citizen of the state.

Now, from a review of the law in respect to private property and the limitations of the Constitution, it seems clear, that when a legislative act interferes with the title to the property of the citizen, or with his enjoyment and disposal of such property, and such act is called in question as unconstitutional and void, its authority and binding force must be tested by the fundamental principles in respect to the rights of private property, the constitutional limitations and the maxims of the common law, which constitute the basis of our system of laws; and it also seems clear that, from the

earliest history of civil society, down through all ages, one of the leading functions of government has been to protect life, liberty, and private property of the individual as sacred. Then, upon what principles or theory can these absolute rights of individuals be infringed or affected by legislative act, or the title to private property be divested and be appropriated by the government without the assent of the owner?" The answer to the question is that, when demanded by the public exigencies, private property may be taken, either by right of eminent domain or by way of taxation, and this modification of the law of natural right becomes an absolute necessity in the maintenance and administration of the government; but in exchange for this sacrifice of property, the individual receives the protection and security guaranteed to him by the government; and when property is taken by right of eminent domain, it is said to be "a universal and permanent proposition in every well regulated and properly administered government, whether embodied in a constitution or not, that private property cannot be taken for strictly private purposes at all, nor for public without just compensation." *The People v. Morris,* 13 Wend., 328. And, again, in the administration of criminal jurisprudence, the government takes private property by way of fine or forfeiture, upon the conviction of certain crimes, and this exception to the general rule seems to rest rather upon the principle that the penalty which must otherwise have fallen upon the person is redeemed or ransomed by this pecuniary fine, according to the ancient maxim, *qui non habet in oere luat in corpore,* and therefore in the superior courts of England fines were frequently denominated ransoms. Broom and Hadley's Com. 630.

The above seem to be the only instances in which the government justly has the right to divest title to the property of the citizen, and therefore it may be stated as an established maxim in the policy of the state, that the legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard of the public welfare. *Taylor v. Porter,* 4 Hill, 745. *Wilkinson v. Leland,* 2 Peters, 658. * * *

If, however, the legislature has authority by enactment to declare that, for an injury of the kind in question the injured party shall be entitled to receive "double the value" of the

property injured, then, does not the authority imply the power in the legislature to make it a hundred times the value of the property; and the excess beyond the damages sustained, whatever it may be, is so much property taken from one person and given to another. If this legislative power exists in respect to the case under consideration, why shall it not on the same principle apply to simple debt, and therefore, if upon demand by the creditor the debtor fails to pay within a certain time, he may by legislative decree be compelled to pay double, treble, or a hundred times the amount of the debt, according as the legislature may decree by legislative enactment. And whatever the object of such legislation may be, it eventuates in a decree taking property from one man and giving it to another; but such legislation is repugnant to the fundamental principles of individual rights, the maxims of the common law, and the constitutional limitations, and therefore it cannot be "the law of the land." *Bay City and Sag. R. R. Co. v. Austin,* 21 Mich., 401. *Lewis v. Webb,* 3 Greenleaf, 326, 330. *Holden v. James,* 11 Mass., 396. *James v. Reynolds,* 2 Texas, 251.

In *Roose v. Perkins,* 9 Neb., 315, ruled in 1879, the court in denying the right of a private suitor to recover punitive damages, said:

If it be said that such (punitive) damages are given as a punishment, it may be answered that the state inflicts punishment, not individuals; as between individuals courts enforce rights. The law protects every one in the enjoyment of his property, and it cannot be taken from him under the pretext of punishment and given to another.

In *Riewe v. McCormick,* 11 Neb. 264, in denying the power of the courts to award punitive damages in favor of a private suitor, upon constitutional grounds, the court said:

Constitutional guaranties of the rights of private property amount to but little if courts sanction its practical confiscation under the name of exemplary or punitive damages. And the effect of permitting the jury to give exemplary damages is to allow them to return a verdict for such sum as their prejudice or caprice may prompt them to do, without regard to the amount of the injury. If it is said that

these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment, and not individuals.

In *Bolt v. Budwig,* 19 Neb. 745, the court said:

Punitive damages are not given in this state in any class of cases between private parties. Compensation, under the rules of law, is all to which a plaintiff is entitled in a civil suit at law.

In *Grand Island & W. C. R. Co. v. Swinbank,* 51 Neb. 525, the court declining to overrule *Atchison & N. R. Co. v. Baty,* in so far as it construed the due process clause of the State Constitution to preclude the allowance of punitive damages in favor of a private suitor, said:

We are asked in this connection to reconsider and overrule *Atchison & N. R. Co. v. Baty,* 6 Neb. 37, holding that portion of the statute already quoted *to be in contravention of the Constitution,* in so far as it attempts to confer a right to double damages. * * * The chief reason for holding the so-called double damage portion of the act bad was, that it took from one litigant property and gave it to another, not in compensation for any wrong sustained, but by way of punishing the defendant; that this was contrary to the rights of property secured by the constitution. The same view and the same policy have been followed repeatedly since in denying the right to punitive damages and we are satisfied that those reasons are well founded. The so called penal statute discussed in *Graham v. Kibble* (9 Neb., 182) was sustained as being a provision for liquidated damages. * * * As said by an eminent court with regard to exemplary damages, such a procedure is "a sort of a hybrid between a display of ethical indignation and the imposition of a criminal fine."

The cases cited so effectually established and settled the doctrine, that the due process clause of the State Constitution forbids the legislature to provide for and the courts to allow punitive damages in any class of cases between private suitors, that it has since been regarded as a closed matter by the

bench and bar, and has only been mentioned incidentally in the later opinions of the Nebraska Court.

By the judgments in the suits now under review, the Supreme Court of the State adhered to the same interpretation of the State Constitution and reaffirmed the doctrine of *A. & N. R. Co. v. Baty* in so far as it rests on the due process clause of that instrument. Judge Root in the ruling opinion in *Cram's case* (printed Record, p. 83), said:

> Counsel for defendant argue that the statute purports to give more than compensatory damages, and therefore is controlled by *Railway Company v. Baty*, 6 Neb. 37; but that case merely disapproved a statute that purported to give double damages, and if the act under consideration *purported* to give double or treble damages, *we would not hesitate to apply the earlier case to the instant one.*

Upon the present hearing we are not concerned as to whether the highest court of the state placed a construction on its Constitution that upon its intrinsic merit is correct. Limited as is this forum to a determination of the rights claimed under the Constitution of the United States, and being bound, like the suitor, by the holdings of the highest court of the State on purely local questions, including interpretations of the State Constitution and statute, the merits of the holdings of the State Court upon this characerisic of the due process clause as employed by the State Constitution, becomes purely academic. It is enough to know that according to those holdings punitive impositions can not be visited upon plaintiff in error for the use of any private suitor; that to construe the legislative act in question as a punitive or police measure, intended to impose exactions in favor of shippers to stimulate obedience to the statute, would have brought it within the condemnation of the State Constitution; and that the State Court openly and avowedly holds that the particular sum and measure of civil damages for delayed shipments of live stock by shippers in car lots is properly a political question subject to be

determined without notice by the judgment of the legislature.

The plaintiff in error is entitled to the same protection of the due process clause of the State Constitution that is afforded to all persons; and for this court to uphold the act in question as a punitive or police measure, in the face of the holding of the State Court that such acts, operating against all other persons, are condemned by the State Constitution, and not within the police powers of the State, would be to deny the plaintiff in error the equal protection of the laws of Nebraska. Accepting the act as a mere legislative provision determining the amount of the pecuniary award in damages in favor of one private suitor against another, as the State Supreme Court has construed and interpreted it, is it violative of the Fourteenth Amendment?

It is not material to the questions here presented that an expression in the opinion in *A. & N. R. Co. v. Baty,* touching another and independent provision of the Nebraska Constitution may have since been disapproved by the Supreme Court of the State, as adverted to in the language above quoted from *G. I. & W. C. R. Co. v. Swinbank,* 51 Neb. 526. It is enough that there has been a steadfast adherence to the interpretation originally placed upon the due process clause of the State Constitution, and that the original interpretation of that clause is affirmed in the opinion in the instant cases. It is appropriate, however, to show that the particular point of departure does not affect the general holding in the original case forbidding punitive recoveries in all classes of suits between private suitors. This is well established by the rulings already quoted, and will be emphasized by a consideration of the particular point of divergence.

Section 5 of article 8 of the Constitution of Nebraska provides that "all such fines, *penalties* and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the

same may accrue." Now, in view of this particular provision, Judge GANTT, after expressing the court's view that the Bill of Rights precluded the award of punitive damages (*A. & N. R. Co. v. Baty*, 6 Neb. 45) added:

Again, it seems clear that the statute in question is incompatible with another provision of the Constitution. It will not be pretended that the act was intended to define a statutory criminal offense. Still, it is impossible to regard the excess beyond the value of the property in any other light than a penalty, not resting in contract, but a penalty or fine for the purpose of punishment; but this penalty, or fine, is by the statute given to the party claiming damage for the accidental loss of his property, and hence the act must come in conflict with that provision of the Constitution which declares that "all fines and penalties * * * shall be appropriated exclusively to the use and support of common schools."

Having reached the conclusion (to which the court has since adhered) that the Bill of Rights forbade punitive recoveries in favor of private suitors, and that punishments can only be inflicted in proceedings prosecuted by the State, the legislative act then under consideration must necessarily have been adjudged void, without regard to the separate provision appropriating all penalties to support common schools. It is therefore immaterial whether the latter provision was rightly construed; or whether, properly construed, it comprehended only penalties enforced, as such, by and in the name of the State. Since the Bill of Rights, according to its settled meaning, does not permit enforcement of penalties except by and in the name of the state, it becomes wholly immaterial whether the separate provision appropriating penalties to support of common schools would, independently and of its own force, accomplish the same object. In either case penalties are not enforceable at the suit of a private party; and the subsequent discussion of this purely academic question, and the disapproval of the opinion expressed by Judge GANTT thereon, in view of

the court's consistent adherence to his interpretation of the Bill of Rights, has no bearing on the question at issue.

In *Graham v. Kibble,* 9 Neb. 185, the court, referring to the constitutional provision that fines shall be appropriated exclusively to the support of the common schools, said:

> On mature reflection we are not prepared to say, nor do we think it was intended by this provision of the constitution to deprive the legislature of the power to pass statutes like the one in question, *whereby a fixed sum in the nature of liquidated damages is given to one who has suffered injury by the wrongful act or oppression of a public officer.*

The act there in question was upheld, not as a punitive imposition, but as a provision for liquidation of compensatory damages. The question of whether liquidation of damages, without notice or opportunity to be heard, is a political or legislative function, or a purely judicial one, subject to the requirement of due process, is a federal question upon which the judgment of the state court is not authoritative.

That legislative authority to liquidate damages was the sole ground of the decision in *Graham v. Kibble* (9 Neb. 185), is affirmed in *Grand Island & W. C. R. Co. v. Swinbank,* 51 Neb. 525, and also in the opinion of the court in the present suits (printed Record, p. 83), wherein the court say:

> On more than one occasion we have upheld the right of the legislature to liquidate damages that may arise from the default of a person *under circumstances which preclude the ascertainment of the actual damages* suffered by the aggrieved person. In *Graham v. Kibble,* 9 Neb. 182, a recovery of the statutory damages of $50 against a public officer for collecting a greater fee for his actual services than the law prescribed was affirmed. In *Clearwater Bank v. Kurkonski,* 45 Neb. 1, the statute permitting a mortgagor to recover from the mortgagee $50 *liquidated* damages for failing to release a chattel mortgage, after it had been fully paid, was sustained; and in *Hier v. Hutchings,* 58 Neb. 334,

we approved the statute providing for recovery of $500 against an officer for rearresting a person who had been discharged on a writ of habeas corpus for the same offense as that described in the officer's warrant. * * * Although the legislature may not prohibit the carrier from transacting business, yet it may regulate the affairs of that *public servant*, and much of the reason for sustaining the power of the legislature to provide that *public officers shall pay a definite sum as liquidated damages* for acts of commission or omission, applies to like provisions in statutes passed to regulate public carriers in the transaction of their business (84 Neb., 613, 614.)

If, in any event, the existence of legislative power, without notice or hearing, to fix or decree the amount of a civil recovery in a court of justice, depends on the inability of the suitors to adduce evidence in court on the issue of actual damage, then that question is inherent in the asserted federal right of due process, and this court will determine it independently. (*Irrigation District v. Bradley*, 164 U. S., 158, 159.)

By the judgment of the highest court of the State, a legislative act fixing and determining the amount recoverable in an action in a court of justice, without any process, hearing or opportunity to be heard, and effectually foreclosing the amount of the liability attaching to future transactions at an arbitrary sum, has been enforced against the plaintiff in error. The legislature of Nebraska has been permitted to bolt and bar the door of justice against the plaintiff in error. The records present to this court for decision whether legislative power embraces this function, to be exercised without notice or hearing.

As an incident or detail of the presentation of this point, it may be stated that the inhibition of the State Constitution against punitive impositions for the benefit of private suitors does not involve the abrogation or impairment of the police powers of the State nor interfere with the proper exercise by the State of these powers. The inhibition merely prevents the prostitution of these inherent powers for the

public welfare to the purposes of private plunder. In this aspect the inhibition rests on high ethical grounds and its application is not limited to this State. Had the legislature deemed a punitive incident or punishment wholesome and necessary to assure observance of the statutory speed schedule it could have levied it as a fine or forfeiture, to be enforced by the state, and appropriated to the public uses specified in the State Constitution. Such is the usual, ordinary, rational and ethical course of legislation, even in jurisdictions where legislative powers extend to imposition of forfeitures for use of informers or other private persons having direct interest in enforcing statutes. Familiar instances are the federal statutes providing pecuniary forfeitures in favor of the government against railroads for failure to unload animals after they have been 28 hours on the car, and for failing to comply with the safety appliance requirements. No doubt this court would feel compelled to follow the local interpretation of the State Constitution, even if to do so involved impairment of the police powers of the State; but it will be gratifying to observe that no such consequences are here entailed.

Imposition of damages in favor of this narrow class of shippers for failure to observe a severe and impractical speed schedule is the equivalent of a rebate. Plaintiff in error urged before the state court that the legislature employed an inapt or false terminology, in substituting "liquidated damages" for "penalty" or "fine," and that the nature of the imposition being penal it should be so adjudged and brought under the condemnation of the state constitution.

That argument was rejected. While holding to the established rule of the forum that the imposition could not stand as a penalty, the court adopted the literal sense of the term "liquidated damages" employed in the act, and held that the act was intended only to liquidate and measure the actual damages suffered by shippers of live stock in car load lots. No other conclusion can be drawn from the record, or from the decisions of the highest court of the state.

This court possesses no power to overrule the holdings of the state court interpreting the state constitution, or to place the rule of punitive damages in force in Nebraska, after the highest court of the state has adjudged that rule to be inhibited by the provisions of the bill of rights of the state constitution. These considerations seem to preclude this court from upholding the statute in question as a police measure. The records raise and present for the decision of this court the grave issue of whether the legislatures of the states may, consistently with the federal guaranty of due process, determine and liquidate the amount of a pecuniary recovery in damages enforceable in favor of one private suitor out of the property of another, in advance of the incident creating the right of recovery, and without notice, or opportunity of hearing, to either party. That issue we now present.

III.

Determination of the amount of the compensation or the quantum of damages suffered by a shipper of live stock in car load lots by prolonging the period of transportation, is a judicial function. It reaches and transfers to the shipper the property of railroads; and to whatever department or forum it may be referred, this function can only be exercised by proceedings conformable to the due process clause of the Fourteenth Amendment of the U. S. Constitution.

Sec. 2, Ch. 107, Laws Neb. 1905, p. 507, as construed by the highest court of the State to be a mere admeasurement and liquidation of damages for a private wrong suffered by an individual, by legislative act or judgment, without notice to or opportunity of hearing by the parties affected, is violative of the due process clause of the Fourteenth Amendment of the U. S. Constitution, and therefore void.

Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (14 Amend. U. S. Const.).

We may concede that the requirement of due process embodied in the Fourteenth Amendment does not specify the forum or department of government in which proceedings depriving one of property must be had. It does not in terms prohibit the States from assigning or delegating any judicial functions to their legislative departments. Historically we know that judicial power was vested in the British House of Lords, and in the assemblies of some of the Colonies. Prior to adoption of this amendment, this court found that the Constitution of the United States contained no inhibition against the power of the States to blend judicial and legislative functions in the same body, so that the legislature might exercise powers similar to those vested in the British House of Lords (*Baltimore & S. R. v. Nesbit,* 10 How. 400);

and prior to this amendment there was no express prohibition against arbitrary deprivation by states of vested property rights, except that against impairment of the obligation of contracts (*Satterlee v. Matthewson,* 2 Pet. 413).

By the Nebraska Constitution, previously quoted, there is an explicit prohibition against exercise by the legislature of judicial power; so the highest court of the State necessarily held that measurement of damages, in the circumstances mentioned in the statute, is not a judicial function, and did not reach the property right of plaintiff in error, nor operate, in absence of allegation or proof of actual injury, to transfer its property to *Cram* and *Kyle.* Facing a writ by which the sheriff may seize and sell its rolling stock and turn the proceeds over to *Cram* and *Kyle,* the plaintiff in error denies the correctness of the State Court's conclusions. That court will not be presumed, in absence of any expression in its opinions and judgments, to have overlooked or deliberately disregarded the distribution of powers contained in the constitution of its state. If, therefore, the function of measuring damages was judicial, and reached the property of plaintiff in error, and transferred it to *Cram* and *Kyle* by force of the statute complained of, the restraint upon the State found in the due process clause of the Fourteenth Amendment has been disregarded. But, in any event, the protection afforded to property rights by that clause is an inhibition against arbitrary deprivation of property by any and every department of the State government, whether executive, legislative or judicial. Excepting the reasonable exercise of the police power, which is not abrogated, and not here involved, the Fourteenth Amendment is a prohibition upon all departments of the state government against interference with rights of private property except by "due process of law."

That the determination of the amount of compensation, or *quantum* of damages to be awarded in a civil suit or proceeding between private persons is, ordinarily, an exclusively

judicial function, will not admit of doubt or disputation. That the exercise of this function reaches the property of suitors, and operates through the process of *fieri facias* or execution to transfer the property of one suitor to another is perfectly plain and well understood, and nowhere disputed. The written Constitutions of the Nation and of practically all the States contain guaranties by which private property is rendered inviolable. These guaranties, for the most part, came from Runnymede, and are hoary with age. All of these Constitutions forbid the exercise of this function of determining the amount of recovery, by which one man's property may be seized on judicial or other process and transferred to another, except upon notice and opportunity for a full and fair hearing in a forum appropriate to determine the property rights involved. As a general proposition, no other doctrine would find ear or patient hearing, or be tolerated for a moment in any self-respecting American Court. A few expressions of the judicial conceptions of the constitutional guaranties of the right of private property, including the requirement of due process, may, however, be appropriate, in recalling this fundamental doctine of our system of government.

Vanhorn v. Dorrance, 2 Dall. 304, the report shows, "was a cause of great expectation involving several questions of constitutional law, in relation to the territorial controversy between the States of Pennsylvania and Connecticut," tried at the Circuit before Justices PATTERSON and PETERS, and a jury, in the district of Pennsylvania at the April, 1795, term. Among other questions arising on a statute of Pennsylvania, and determined by reference to the Bill of Rights of the State Constitution, was that on divesting, for a public purpose, a land title previously granted by the State, the State had no power to arbitrarily determine the measure or character of compensation or damages accruing to the owner. It was held that the right of enjoying and protecting property is not *ex gratia* from the legislature, but *ex debito* from

the Constitution. In charging the jury, PATTERSON, J., said (pp. 312, 313):

The Legislature declare and enact, that such are the public exigencies, or necessities of the State, as to authorize them to take the land of A and give it to B; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the Constitution, direct, and they accordingly declare and ordain, that A shall receive compensation for the land. But here the Legislature must stop; they have run the full length of their authority, and can go no further; they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the Legislature should, of themselves, without participation of the proprietor, or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways. 1. By the parties—that is, by stipulation between the Legislature and proprietor of the land. 2. By commissioners mutually elected by the parties. 3. By the intervention of a Jury.

Later in the course of his charge, after contrasting the act of Pennsylvania with the proceedings taken by the British Parliament to acquire the Isle of Man, PATTERSON, J., thus characterized the Act of the State of Pennsylvania (p. 314):

Shame to American legislation! That in England, a limited monarchy, where there is no written Constitution, where the Parliament is omnipotent, and can mould the Constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the Legislatures are limited; where we have republican governments, and written Constitutions, by which the protection and enjoyment of property are rendered inviolable.

Speaking to the same point later in the charge (pp. 315, 316) the court said:

The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposi-

tion of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. * * * The proprietor stands afar off, a solitary and unprotected member of the community, and is stript of his property, without his consent, without a hearing, without notice, the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the Legislation of a Republican Government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an Asiatic Prince? Omnipotence in Legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of Laws, of Courts, of Constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had Constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.

The expressions quoted indicate the judicial conception of the office and purpose of constitutional guaranties of the right of enjoyment of private property at a time almost contemporaneous with the adoption of our constitutional system, when there were no precedents to guide or fetter judicial action and expression. Omnipotence in a Republican Assembly was to the judicial mind, at that time, no less a despotism than the unchecked power of an absolute monarch. The protection of all persons in the enjoyment of their private property, except when deprived of it by the verdict of a "jury" or "by the law of the land" was regarded as "a barrier betwen the legislature and the individual" that ought never to be removed. The wisdom of the American Judges who have administered justice under the con-

stitutional system for upwards of one hundred and seventeen years since those views were thus expressed has not abandoned, and has but little improved the notions of Justice PATTERSON touching the purpose and operation of the constitutional guaranties of the right of private property. More than seventy years later the States by adopting and ratifying the Fourteenth Amendment made that doctrine a part of the fundamental law of the Nation, and delegated to the Federal Government coercive power over all the departments of the States to compel obedience thereto.

In *Loan Association v. Topeka,* 20 Wall. 655-667, this court adjudged invalid a legislative act of Kansas authorizing cities to issue bonds to encourage establishment of manufactories and other enterprises. Under pretended authority of the act the City of Topeka issued $100,000 in bonds to encourage a corporation to establish bridge shops within the City. In approving a decree enjoining collection of taxes for payment of the bonds at the suit of a tax payer, Mr. Justice MILLER said:

> A government * * * which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. * * * No Court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which

should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

In the same opinion (20 Wall. 664) legislative interference with the rights of property is thus denounced:

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Illustrating the consequences of relaxing the constitutional guaranties of the rights of property, it is further said (20 Wall. 665):

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

The application of the doctrines quoted to the cases under review is in nowise lessened by the circumstances that the suit in which they were held originated in the Circuit Court of the United States and the court was, therefore, at liberty to apply the provisions of the State Constitution which condemned the legislative scheme of giving public aid to a private enterprise. The power of the State to fix and determine without notice or hearing how much of the property of one private suitor shall be given to another, or "to lay with one hand the power of the government on the property of the

citizen, and with the other to bestow it upon favored individuals" is interdicted by the due process clause of the Fourteenth Amendment. It has since been definitely held that a claim that one has been deprived of his property without due process, because of the imposition of a tax for private uses, raises a federal question under the Fourteenth Amendment, which requires this court to determine independently in accordance with its own views, whether the use for which the tax was levied is a public or private one (*Irrigation District v. Bradley*, 164 U. S., 158, 159). Under such assignment, in order that the statute authorizing the levy may escape the condemnation of the due process clause of the Fourteenth Amendment, it must appear that the tax is imposed for a public purpose.

In *Davidson v. New Orleans*, 96 U. S. 107, Mr. Justice BRADLEY, concurring in the conclusion and general tenor of the opinion and judgment (which ruled no point adversely to the present contention of plaintiff in error) expressed a caution against narrowing the scope of inquiry as to what constitutes due process of law. He gave expression to the scope and operation of the due process clause of the Fourteenth Amendment with unsurpassed accuracy as follows (96 U. S. 107, 108):

It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment, or the want of judicial proceeding. If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. The distress-warrant issued in the case of *Murray's Lessee et al. v. Hoboken Land and Improvement Co.* (18 How. 271) was sustained, because it was in consonance with the usage of the English government

and our State governments in collecting balances due from public accountants, and hence was "due process of law." But the court in that case expressly holds that "it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will" (p. 276). I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but "due process of law," provided by the State law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require.

In *Missouri P. R. Co. v. Nebraska,* 164 U. S. 403-417, this court held invalid a statute of Nebraska, as construed by the highest court of the State, and an order of the Board of Transportation made under its authority void, which required the Railroad Company to furnish without compensation to applicants therefor a location on its right of way for a grain elevator. In the opinion it was said by Mr. Justice GRAY (164 U. S. 417):

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the

petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendments of the Constitution of the United States. *Wilkinson v. Leland,* 27 U. S. 2 Pet. 627, 658; *Den. Murray v. Hoboken Land & I. Co.,* 59 U. S. 18 How. 272, 276; *Citizens' Sav. & L. Asso. v. Topeka,* 87 U. S. 20 Wall. 655; *Davidson v. New Orleans,* 96 U. S. 97, 102; *Cole v. La Grange,* 113 U. S. 1; *Fallbrook Irrig. Dist. v. Bradley,* 164 U. S. 112, 158, 161; *State v. Chicago, M. & St. P. R. Co.,* 36 Minn., 402.

It will not escape notice that the opinion quoted holds to the doctrines announced by Mr. Justice MILLER in *Loan Ass'n v. Topeka,* 20 Wall. 655, by specific reference, in applying the condemnation of the Fourteenth Amendment to the State statute and order there in question.

In *Wilkinson v. Leland,* 2 Pet. 656-658, the court had under consideration the validity of a statute of Rhode Island. After noting that Rhode Island was the only State not having a written Constitution, and that the Charter granted by Charles II. continued in force, except as modified by the revolution, Mr. Justice STORY said:

In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed, that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty before the revolution, it can scarcely be imagined, that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no Court of Justice in this

country would be warranted in assuming, that the power to violate and disregard them,—a power so repugnant to the common principles of justice and civil liberty,—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In *Terret vs. Taylor,* 9 Cranch, 43, it was held by this Court, that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be reassumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared therefore to admit, that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties.

Sixty-seven years after Justice STORY asserted these to be fundamental principles of a Republican Government, and after they had been written by the States into the Fourteenth Article of Amendments of the Constitution of the United States, they were, by reference, held to be the foundation of the due process clause of that Amendment, and were applied in extending the condemnation of that clause to a statute of the State of Nebraska, under consideration in *Missouri P. R. Co. v. Nebraska,* 164 U. S. 417.

In *Monongahela Navigation Co. v. United States,* 148 U. S. 311-345, the court had occasion to apply the restraint imposed by the Fifth Amendment upon the power of Congress. The act then under consideration provided for the appropriation of lock and dam No. 7 in the Monongahela River, owned by

the Navigation Company by treaty conducted by the Secretary of War, if may be, within a specified sum; or, that failing, by condemnation proceedings in conformity to a procedure defined in the act. It was provided that in estimating the sum to be paid by the United States the franchise to collect tolls should not be considered. In holding the act invalid, in so far as it undertook to determine what elements were proper to be taken into consideration by the court in assessing the damages, the late Mr. Justice BREWER said (pp. 325-328):

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire Amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being "Nor shall private property be taken for public use without just compensation." The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public

uses unless a full and exact equivalent for it be returned to the owner.

We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration. This is a question which may arise possibly in this case, if the seven locks and dams belonging to the Navigation Company are so situated as to be fairly considered one property, a matter in respect to which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by themselves constitute a separate structure and separate property, and the thoughts we have suggested are pertinent to such a case.

By this legislation Congress seems to have assumed the right *to determine what shall be the measure of compensation.* But this is a judicial, and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge Proprs. v. Warren Bridge Proprs.,* 36 U. S. 11 Pet. 420, 571, Mr. Justice McLean in his opinion referring to a provision for compensation found in the charter of the Warren bridge, uses this language: "They (the legislature,) provide that the new company shall pay annually to the college in behalf of the old one a hundred pounds. By this provision it appears, that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled." See also the following authorities: *Com. v. Pittsburgh & Co. R. Co.,* 58 Pa. 26, 50; *Pennsylvania R. Co. v. Baltimore & O. R. Co.,* 60 Md. 263; *Isom v. Mississippi Cent. R. Co.,* 36 Miss. 300.

In the last of these cases and on page 315, will be found these observations of the court: "The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own

case to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so."

The opinion in *Isom v. Mississippi C. R. Co.* 30 Miss. 300-315, in addition to the language quoted approvingly by Mr. Justice BREWER in the case last cited, employed the following pertinent language:

The spirit and policy of our institutions are at war with the doctrine of legislative omnipotence. Our government is founded upon express written compact, reduced to exactitude and certainty, expressive of the soverign will of the people, fixing the limits and marking the bounds of legislative, executive and judicial powers; our Constitutions all originated in *a spirit of distrust of governmental power*, and a conviction that, unrestrained, its tendency was to despotism. * * *

The legislature may not, therefore, exercise powers which in their nature are judicial, or forestall the citizen in his remedy therein, *by due process of law*, for injuries to his lands or goods. * * *

The right to decide whether benefits * * * (are) a legal offset * * * is a judicial, and not a legislative power; one belonging to courts and juries, and not to lawmakers or legislatures, under our system of government. In this view, therefore, it is equally clear and undeniable, that this direction and instruction to the jury by the legislative power, was an invasion of the powers belonging to the judicial department, expressly forbidden by the Constitution and therefore void.

It thus appears that the constitutional guaranties of the rights of private property are restraints upon arbitrary exercise by the Nation and the States of the sovereign powers of taxation and eminent domain—prerogatives the proper

exercise of which are essential to the support and maintenance of any organized government. In a system of social government in which the inviolability of property is sacred against arbitrary exactions for the extreme necessities of the *State,* is it possible that the State is left free to take the property of a citizen and turn it over to a *private* person without notice, process or hearing? Is it possible that our Constitution affords private property ample protection against *public necessity,* and none whatever against *private exactions?* Is the right to a hearing, to contest for the continued enjoyment of private property after notice of an adverse claim in some appropriate proceeding conformable to due process, less sacred against private exactions than against public necessity?

The application of the constitutional principles at the foundation of the judicial utterances above quoted cannot be excluded from the cases under review, by reference to the specific constitutional requirement of just compensation for property taken for public use. It was decided by this court that the validity of taxes authorized by a statute of California to sustain an irrigation project was to be tested by the due process clause of the Fourteenth Amendment. The power of the State to reach private property by taxation was held to depend upon a consideration of whether the taxes were imposed for a public purpose. Had the project been held to be a private enterprise the due process clause would have effectually nullified the levy (*Irrigation District v. Bradly,* 164 U. S. 159). Nor can such a differentiation be rationally made in the case of *Monongahela Navigation Company* ruled previous to the case of the *Irrigation District.* The Fifth Amendment providing for just compensation for private property taken for public use contains no specific direction as to the manner or form in which the measure of compensation shall be ascertained. It was ruled by this court, however, that the principle of compensation being thus established, the determination of the measure thereof was a purely judicial function, not competent to be performed by

Congress. The want of power in Congress to determine or pass judgment upon that issuable fact was not declared by the narrow clause adopting the principle of compensation. But since the determination of that fact affected the private property of the Navigation Company, of which it could not be deprived without process, the due process clause of the same Amendment necessarily deprived Congress of the power to arbitrarily determine that fact without notice or opportunity for hearing. The opinion in *Isom v. Mississippi C. R. Co.* 300-315, approved by Mr. Justice BREWER, expressly denied the power of the legislature, in such case, to determine the measure of compensation, because to do so would forestall the citizen of his remedy "by due process of law for injuries of his lands or goods." It is also true that the division of powers, as made in the Constitution of the United States, assigned no judicial powers to the Congress, and by implication withheld all judicial power from Congress. While this consideration must, of itself, have determined the judgment, the arbitrary assessment of compensation was, nevertheless, violative of the due process clause of the Fifth Amendment, and the opinion so implies.

It has been definitely ruled that the requirement of due process of the Fourteenth Amendment is operative upon the States to require just compensation for private property taken for public use, and that in this behalf it operates upon all departments of the State, including the courts. The State courts cannot satisfy the constitutional guaranty by merely granting a hearing; they must, upon a hearing, recognize and enforce substantive rights of property. To this point, Mr. Justice HARLAN in *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 233-236, thus expressed the opinion of the court:

> But it must be observed that the prohibitions of the Amendment refer to all the instrumentalites of the State, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that Amendment

against deprivation by the State, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the State's power, his act is that of the State." This must be so, or as we have often said, the constitutional prohibition has no meaning, and "the State has clothed one of its agents with power to annul or evade it." *Ex parte Virginia,* 100 U. S. 339, 346, 347; *Neal v. Delaware,* 103 U. S. 370; *Yick Wo v. Hopkins,* 118 U. S. 356; *Gibson v. Mississippi,* 162 U. S. 579. These principles were enforced in the recent case of *Scott v. McNeal,* 154 U. S. 34, in which it was held that the prohibition of the Fourteenth Amendment extended to "all acts of the State, whether through its legislative, its executive, or its judicial authorities;" and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment.

Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States v. Cruikshank,* 92 U. S. 542, 554; *Leeper v. Texas,* 139 U. S. 462, 468. But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is the due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: "Can a State make anything due process of law which,

by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation." *Davidson v. New Orleans,* 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a State court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that Amendment.

It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.

In *Davidson v. New Orleans,* above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See also *Missouri P. R. Co. v. Nebraska, Board of Transportation,* 164 U. S. 403, 417. Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty," Mr. Broom in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation," p. 228. The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost

all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 2 Story, Const. Sec. 1790; 1 Bl. Com. 138, 139; Cooley, Const. Lim. 559; *People v. Platt,* 17 Johns. 195, 215 (8 Am. Dec. 382); *Bradshaw v. Rodgers,* 20 Johns. 103, 106; *Mount Washington Road Co.'s Petition,* 35 N. H. 134, 142; *Parham v. Decatur County Justices of Inferior Ct.* 9 Ga. 341, 348; *Ex parte Martin,* 13 Ark. 199, 206 et seq.; *Johnston v. Rankin,* 70 N. C. 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

Since the leading cases are referred to in the quoted opinion of Mr. Justice HARLAN it is not necessary to further collate or review the repeated utterances of the court to the same effect. It is true the property of railroads is employed to perform the public service of transportation; but it is, none the less, private property, under the dominion of private ownership, and within the protection of constitutional guaranties. Because of its public employment this species of property is not left open to exploitation and plunder, nor excepted from

the protecting guaranties of the Fourteenth Amendment, nor subject to deprivation by the State under the guise of regulation or any other pretext employed to cloak or veil the attempted exercise of arbitrary power. This doctrine has been repeatedly announced and affirmed by the judgments of this court. In at least three cases it was applied to condemn exercise of arbitrary power by the state in which the cases under review originated (*Missouri P. R. Co. v. Nebraska*, 164 U. S. 417; *Smyth v. Ames*, 169 U. S. 466; *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196).

In *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418-466, Mr. Justice BLATCHFORD said:

In the present case, the return alleged that the rate of charge fixed by the Commission was not equal or reasonable, and the Supreme Court held that the Statute deprived the Company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the Company is deprived of the equal protection of the laws.

It is not material in this presentation to define the constitutional terms "due process of law," nor to review or rehearse the definitions given by this court of these terms as employed in the Fourteenth Amendment. They admittedly guarantee notice of some sort, and an opportunity to contest in some manner for the right and enjoyment of private property. Without these attributes the constitutional guaranty would

be a sham and mere false pretense. The Nebraska Statute here assailed fixes the sum for which *Cram* and *Kyle* have been adjudged to have execution against the property of plaintiff, without allegation or proof of injury or damage, in advance of the transaction, and without any pretense or possibility either of notice or opportunity to plaintiff in error to contest. It effectually forestalls plaintiff in error, in advance of the transaction, of its remedy "by due process of law." In such case where the statute entirely disregards the most fundamental and obvious requirement of some sort of process, and assumes arbitrary power to determine a fixed sum that shall be taken from the property of one person and given to another, without even a pretense of notice or opportunity for hearing, it is mere idleness and jest to enter upon the refinements and distinctions involved in the definition of terms. There is here no *process* of any sort that can give play to arguments or distinctions as to what constitutes *due* process.

In *Ives v. South B. R. Co.*, 200 N. Y., 271; 94 N. E., 431, the Court of Appeals of New York, by a unanimous decision held the Workmen's Compensation Act of that state invalid as violative of the constitutional requirement of due process. The act which there fell under the condemnation of the constitution was thought to be humane in conception and philanthropic and charitable in purpose; and in that aspect contrasts strangely with the Nebraska statute in question, whose obvious and sordid purpose is the bestowal of favors upon shippers of livestock in car load lots. It is interesting to note that in a situation where humanitarian impulses were betrayed by expression of sympathy for the motives which actuated legislative action, the highest court of New York expressed its conception of the requirement of due process as follows:

"Process of law" in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance

with those ancient and fundamental principles which were in existence when our Constitutions were adopted. "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not due process of law." *Ziegler v. S. & N. Ala. R. R. Co.*, 58 Ala., 594. * * * The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by Legislatures. In a government like ours, theories of public good or necessity are often so plausible or sound as to command popular approval; but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law, as used in this sense, means the basic law, and not the very act of legislation which deprives the citizen of his rights, privileges, or property. Any other view would lead to the absurdity that the constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the constitution are a mere waste of words.

Domestic animals constitute a considerable portion of the national wealth. The variations in value of different members of the same species will show, in horses for example, divergencies between $25 and $100,000. Divergencies equally marked in the valuations of individual members exist in all the different species of domestic animals. In our system of government these animals are not subject to be valued by legislative act, any more than are lands or corporate franchises which were the subjects involved in some

of the cases reviewed. If the legislature had enacted "Every person who wrongfully takes and converts any animal, the property of another, shall pay to the owner $50 for each animal so taken and converted, to be recovered by action in the manner other debts are enforced, as liquidated damages," would the judges, sworn to support the Constitution, be obliged to regard such act in a suit for conversion of a young stallion holding the world's speed record and of the value of $100,000? Or would the court be obliged to enter judgment of $50 in a like suit for the conversion of a lamb worth only $2? Could the statute preclude judicial inquiry and ascertainment of the extent of actual injury and the fair and just compensation for the wrong suffered, in either case? Of course there would be no means by which the legislature could, in advance of the event, ascertain the actual damage. At the time the act was passed the circumstances, awaiting future developments, would preclude proof of the amount of actual damage. Neither would there be any means by which the legislature could determine whether any future event would, or would not, develop facts from which the amount of the actual damage could be ascertained.

There is no difference, in principle, between the supposed case and the act here in question. The legislature can no more determine the money equivalent of an injury, likely to befall an animal or a car load of animals, from a contemplated future hazard or contingency, than they can the value of the animals themselves. In both cases the judicial character of the function is the same. Both cases, alike, involve the rights of private property, and must be determined upon notice in conformity to the constitutional requirement of due process.

The general principle of jurisprudence and constitutional law involved in the approval of the Nebraska statute under consideration will not operate always, or necessarily, to the prejudice of the delinquent or debtor class, nor always, in

the case of the particular statute, to the prejudice of the railroads. Mr. *Cram's* 21st cause of action (printed Record, p. 15) claimed for a delay of 52 hours and 18 minutes in which his animals were unloaded and cared for in transit over Sunday when operation of freights was suspended. Suppose his car load had comprised animals of the value of $1,500, and had been delayed in the car for that length of time in the hot weather of early September, without food or water, and in consequence of the delay had died. He would have been deprived of property of the value of $1,500 by the fault of plaintiff in error; and yet, by the statute, which *liquidated* his damages, he could recover only $520. The liquidated sum becomes "on the happening of the event on which its payment depends, *the precise sum to be recovered,* and the jury are confined to it" (Sutherland Damages, p. 710). Mutuality is of the essence of every valid provision for liquidated damages. The sole office and purpose of its employment is to foreclose all inquiry into the amount of actual damages. Without this incident the damages would not be liquidated or measured. The issue of the amount of damages cannot at the same time be both opened and closed.

Let us instance a further case in which delay occasions damages because of fluctuations in the market. One hour's delay in the delivery of a double-deck car load of 250 sheep may lose to the shipper the market of the day of delivery. The market of the next day is glutted and depressed $1.00 per head below that of the previous day. By one hour's delay the shipper has suffered a loss of $250, the amount of which is susceptible of definite proof; but by the statute his damages are *liquidated* at $10.

No difficulty would attend the proof of actual damages if *Cram* became entitled to the full value of his animals. In such case would this court hestitate to say that the Fourteenth Amendment operates to deprive the State of the power to arbitrarily determine without notice, process or proceed-

ings, other than legislative, that *Cram* should accept $520 for the deprivation of property of the value of $1,500? The *power* once admitted, the individuals or classes to be prejudiced by its exercise would depend wholly upon legislative favor, alternately bestowed upon the carriers and the shippers. Because the right of just compensation is inherently an attribute of private property, neither the valuation of private property, nor the valuation of the property right of damages, can be made by arbitrary legislative act. From the very nature of the right involved, this function must be postponed till some event calls for its exercise, and then it must be exercised in conformity to due process. So, in principle, the cases cited, holding that upon legislative exercise of the power of eminent domain, the incident of property valuation must be reserved, are controlling precedents against the validity of the statute of Nebraska here questioned. But the present case is even stronger because the function here exercised does not involve the power to maintain and perpetuate the government, as did the eminent domain and tax cases cited.

It is true that the State Court's opinions in the present suits do not contest the doctrine that, in ordinary cases, the ascertainment of the amount of pecuniary recompense between individuals, is a purely judicial function involving the deprivation of property that can only be done in appropriate proceedings on notice and opportunity for a hearing. The Nebraska Court does not distinctly disavow the general inviolability of private property. Its decision merely opened a silent approach by which *Cram* and *Kyle* could reach and appropriate the property of plaintiff in error otherwise than by the constitutional rule of due process. The judgments under review approve of legislative provision for this back-door, dark-alley approach for *Cram* and *Kyle,* and other car load shippers, to reach the property of plaintiff in error in other than the constitutional mode, *only* "under circumstances which *preclude the ascertainment* of

the actual damages suffered by the aggrieved person" (printed Record, Cram's case, p. 83).

Is it true then, that the restraint, upon the States, of the due process clause of the Fourteenth Amendment, is operative to hold property rights sacred and inviolable in some cases, and not in others? May the operation of the due process clause be suspended by any State legislature, if according to that body's fancy some wrong may, *in the future,* be done to property, under circumstances which render difficult of proof, or even "precludes ascertainment" of the amount of actual damages? Does the right of due process depend upon whether the matter to be determined is simple, or involved; or whether proof of the facts is easy, or difficult? Is the right of *arbitrary* disposition of private property reserved to the States in those cases where proof of actual ownership is difficult, and denied only where the proof is obvious and plain? Is there a field between the judiciary and the legislature over which power is not definitely assigned, a sort of "twilight zone" not illumined by the light of the Constitution in which, under cover of darkness, the legislature may exercise despotic power over the property of the citizen, out of the reach of constitutional restraints? Does the mere fact that an issue may be difficult of solution make its determination more appropriate for legislative than for judicial action, or peculiarly subject to despotic power, rather than to legal process?

Is there a narrow class of cases in which proof of the extent or exact amount in value is difficult, that is excepted from the protecting arm of the Federal Constitution, and withdrawn from the operation of the due process clause of the Fourteenth Amendment? In the form adopted by the people the requirement that no state shall deprive *any person* of property without due process of law, is absolute, unqualified and without any exception. If there is any power, by judicial construction, to carve out this one exception, and to bestow arbitrary and autocratic power over this class of

property, how many other exceptions and modifications may not the judiciary sanction?

The absolute and unqualified requirement of due process is not compatible with the existence of arbitrary power in any department of the State government over the property of plaintiff in error. It is no justification of the act in question that the State Court considered actual prejudice to plaintiff in error is not so *evident* as in cases where proof of the measure of its liability is more certain. The right of due process is not dependent on any such uncertain contingency. This court has never sanctioned an invasion of the Constitution on the ground that the mischief entailed in the particular case was not so great as it might be in others, or that there might have been a wider departure from the constitutional rule. To the contrary, Mr. Justice BRADLEY, in *Boyd v. United States,* 116 U. S 635, expressed the opinion of the court as follows:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substances and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

We are considering legislation of a State whose Constitution prohibits punitive recoveries in all classes of suits between private persons, and where punishment can only be inflicted by and in the name of the State. The judgment

here pronounced must determine whether arbitrary power resides in the legislature to determine, in advance and without notice or process, the amount of the pecuniary claim of one person against another.

Let us assume the legislature to be unfettered in the exercise of this despotic power. The power once admitted, the legislature may fix the sum or amount of the claim at any figure that suits its will or whim, or that will gratify the cupidity of the favored class. For example the legislature of North Dakota, more moderate than that of Nebraska, in an act, since held invalid as an undue burden on commerce, fixed $5 per car per each hour as the measure of the stock shipper's claim for delay in transportation beyond a statutory speed schedule (*Douglas v. Northern P. R. Co.,* 125 N. W. 475). While liquidating the stock shipper's claim at $10 per hour for each car, under the act in question, the Nebraska legislature has fixed the same sort of claim for delays at the stock yards in unloading at $2.50 per half hour (Comp. Stats. Neb., ch. 4, art. 3, sec. 9). As expressed by the Nebraska Court, if a party "can lawfully stipulate that the damages shall not exceed $100, he could likewise contract that he should not pay more than $25 or any smaller sum" (*C., R. I. & P. R. Co. v. Witte,* 32 Neb. 383, 384).

The legislature, unfettered in its power to liquidate and measure damages, may supersede the functions of the court and jury by legislating that every person who, without justifiable cause, publishes, in writing, or orally, any defamatory matter of another shall pay to the person of whom the publication was made as liquidated damages the sum of $10,000, to be recovered in a civil suit; that every person who shall break a promise to marry shall pay to the person to whom promise was made, as liquidated damages, the sum of $100,000; that every man who carnally knows the wife of another shall pay to her husband as liquidated damages the sum of $200,000; that every person who falsely imprisons

another shall pay to the person so imprisoned the sum of $50,000; and so on through the category of torts in which damages are not of definite or certain proof. In respect to damages for breach of contracts, the legislature, responding to the importunities of influential classes may enact that every building contractor who fails to complete the erection of a dwelling within the time agreed shall pay to the owner the sum of $500 per day for each day's delay, as liquidated damages; and every person failing to deliver to the purchaser of any animal which he has by contract agreed to do, shall pay to the purchaser, for each horse $200, for each head of cattle $100, for each sheep $25, and for each hog $20, as liquidated damages, and so on through the whole category of the subjects of sales.

To this end the free exercise of the unfettered power, held by the State Court in the cases of *Cram* and *Kyle* to reside in the legislature, will tend. The unloosening of the fetters on absolute power would develop favored classes, and disfavored and odious classes, and would be marked by a trail of ruin and oppression such as the English speaking people have never seen since the granting of the Great Charter. It would invite and create a despotism that would be indeed cruel. True it would be a despotism of the majority, but none the less a despotism. Nor would such a despotism be less cruel than one exercised by a single person. There is no despotism so relentless as that of the majority, in whose very persons resides the physical power of execution. The individual despot must have some respect to the superior force of numbers, and to the power of revolution, which the majority may and does hold in contempt, as was illustrated in modern times during the dark days of Paris. It was therefore a well founded suggestion of Mr. Justice MILLER, in *Loan Association v. Topeka,* (20 Wall. 655), that if despotic power must be, it is "wiser that this power should be exercised by one man than by many." In this forum where the final word is spoken touching the power of the states and the rights of the citizen, the court looks beyond

the sordid interests of the immediate suitors, to the higher interest and security of society, and discharges its highest and most sacred trust to the millions who comprise this great nation, of preserving unimpaired their rights of person and property and enforcing their self-imposed restraints on arbitrary power. While the requirement of due process is in terms absolute and obviously condemns and destroys section 2 of the act under consideration, the grave considerations suggested emphasize the propriety of a liberal construction to effectuate the great ends of the Constitution.

If the due process provision of the Fourteenth Amendment operates, by its own force and vigor, as a restraint upon exercise of power not in conformity thereto, as uniformly held by this court, then its own terms will not admit of excepting cases of the class suggested, in which it is difficult to prove the exact amount of damages. The constitutional requirement being in terms, absolute the court is without power to interpolate any such exception. The State Court has assumed that the rule applied by many courts, of enforcing liquidated damages stated by contract, only in those cases in which proof of the precise amount is difficult, would also be an appropriate test of legislative power. The soundness of the rule itself was denied by this court in *Sun Printing and Publishing Co. v. Moore,* 183 U. S. 642. But the State Court overlooked the fact that private parties can by contract do many things compelling the sanction of the courts, which are utterly beyond the power of the legislature. For example, A can convey and deliver his land to B as a gift for private uses. This precise illustration is employed repeatedly in the cases cited, by Justices PATTERSON, STORY, MILLER and HARLAN, as an example of what the legislature is powerless to do arbitrarily by an act of legislation. So, too, the parties may by contract fix and liquidate the value of any item of property, or state the sum that shall be paid in damages in a certain contingency; but the legislature is altogether powerless to take from the citizen his liberty to fix his own price, and to usurp that private and personal attribute of liberty and the pursuit of happiness.

IV.

If it be assumed that difficulty in proving the amount of damages is sufficient to relieve the function of determining the amount of recovery from the reach of the guaranty of due process, the issue of whether such difficulty of proof subsists is a Federal question upon which the decision of the State court is not controlling.

The holding of the State court, that proof of the amount of damages accruing from delay in transporting live stock in cars is difficult or impossible, is palpably erroneous, contrary to common experience, and without any basis or foundation upon which to rest.

It seems obvious that the suggested doctrine is subversive of all constitutional guaranties of the inviolability of private property, and is fraught with dangers so great as to preclude its serious consideration by this court. But, since it was adopted by the State Court, we lay aside that consideration for the purpose of presenting the merits of the State Court's conclusion based upon it.

The ground upon which the State Court's conclusion that ascertainment of the amount of damages sustained by delays in transporting live stock is not exclusively a judicial function, nor subject to the requirement of due process, is, that strict proof of the precise amount is difficult. But the act in question is indefensible even if judged by that test. It is submitted, with due deference to the high standing of the State Supreme Court, that its suggestion that proof of damages is difficult to obtain in such cases, is contrary to all experience and without any basis or foundation upon which to rest. The suggestion is not founded on either averment or proof, but is asserted upon judicial knowledge alone. Upon this review the fact or conclusion so asserted is, therefore, entitled only to such weight as is justified by the common experiences of which all courts take notice.

We assume that this conclusion or finding of the State Court is subject to determination here according to the views of this court, for the following reasons. The applicability of the constitutional requirement of due process to the function of determining the amount of civil damages sustained by *Cram* and *Kyle,* must, in this aspect, depend upon the correctness of the State Court's conclusion that proof of the amount of damages is difficult. The theory asserted by the State Court is, therefore, inherent in, and inseparable from the federal right asserted by plaintiff in error.

The legal aspect of the situation is precisely analogous to the case in which a state court determined that a tax assessment for a water project was not subject to the requirement of due process, because imposed for a public use. Had the imposition been for a private use, as asserted by the property owner, the guaranty of due process would have invalidated it. This court reserved to itself the function of determining, according to its own views, the issues upon which the applicability of the constitutional requirement depended, and in *Fall-Brook Irrigation District v. Bradley,* 164 U. S., 159, said:

> We do not assume that these various statements, constitutional and legislative, together with the decisions of the State Court, are conclusive and binding upon this court upon the question as to what is due process of law, and as incident thereto, *what is a public use.* As here presented these are questions which also arise under the federal constitution, and we must decide them in accordance with our views of constitutional law.

The inquiry being open, the following considerations show the palpable error of the holding of the State court that actual proof of the amount of damages is difficult or unobtainable.

1. The statute, in terms, covers all damages to animals caused by delays in shipment beyond the prescribed minimum speed. It therefore covers cases of death, fluctuations

of market, and shrinkage in weight. In each of these cases actual proof of the measure of damages is ready, convenient and certain. If death of an animal results from delay or protracted confinement in the car, the measure of damages is the market value of the animal immediately before being subjected to the fatal injury. There is an established daily market, by which losses from fluctuations, occasioned by missing the most favorable market through delay, can be definitely ascertained. The shrinkage in weight is definitely ascertained by the *scaling* at the point of shipment to ascertain freight charges, and scaling again at point of delivery. The normal ratios of shrinkage, as related to periods of confinement in cars, are well known to dealers by statistics preserved from actual experience.

2. Since the devlopment of the great packing house enterprises merchantable cattle have a definitely fixed and convertible value every day at every railroad station in the cattle producing territory. One of the great packing centers is South Omaha, Nebraska, to which the shipments in question, as practically all shipments in that state, were destined. If by delay an animal loses all market value, the proof of the measure of damages is, of course, the value it would have had but for the injury. Otherwise the animal will have a market value at South Omaha, depending on its weight and *grade,* at a definitely fixed price. Thousands of cattle are delivered to that market daily by railroads which diverge to every point of the compass, and are there definitely valued according to weight and grade, and converted into money. That was done in the case of every shipment by *Cram* involved in his 25 causes of action. The actual market value at destination of *Cram's* cattle involved in each cause of action was definitely ascertained, on the days of delivery, and they were all converted into money at that market. *Cram,* therefore, had recourse to the testimony of those who graded and ascertained their value for that market. The same skilled judges knew what would have been the grade

and value in any established condition of the cattle if no delays had attended their transportation. The difference is the legal measure of damages. What is true in *Cram's* case is common with all live stock shipments. The legislature could hardly have selected an instance, in the whole field of jurisprudence, in which the actual damages were of so definite, certain and ready proof, as that of injury to live stock caused by delay in transportation.

3. Previous to the adjudications under review, the Nebraska court had not found that there was any difficulty in proving the amount of damages actually sustained in such cases. The opinion in *Cram's* case (printed Record, p. 82) cites *Nelson v. C. B. & Q. R. Co.*, 78 Neb. 57, and *Denman v. C. B. & Q. R. Co.*, 52 Neb. 140, as instances in which recoveries for mere delay were had against the plaintiff in error upon proof of amounts. Numerous other cases of like character could have been instanced, among which are *C. B. & Q. R. Co. v. Williams*, 61 Neb. 608, and *Wente v. C. B. & Q. R. Co*, 79 Neb. 179.

In *Squires v. Elwood*, 33 Neb. 126, the court denied effect to a contract stipulation for liquidated damages for breach of a contract to sell 3,500 sheep, and said:

> The damages resulting from the breach of such a contract are ascertainable by evidence, and the general rule governing the measure of damages in cases like this is well understood to be the difference between the contract price of sheep and the market value of the same at the time and place where they should have been delivered under the contract.

In *Gillilan v. Rollins*, 41 Neb. 540, the Court in refusing to enforce a stipulated sum mentioned in a contract as liquidated damages for failure to build and operate a street railroad, said:

> One is entitled to recover from another with whom he has made a contract which the other has violated, such damages as will put him in as good position as he would have occupied had the contract been performed; but he is not entitled to re-

cover such damages as would make him a gainer by reason of the other parties' violation of the contract.

In *Lee v. Carroll Normal School*, 96 N. W. (Neb.) 65, the Court, declining to enforce a contract stipulation liquidating damages for delay in the construction of a building, at $25 per day, said:

> The law imposes no penalty as such, but simply requires the defaulting party to make good such pecuniary loss as his neglect has produced; and this loss is to be determined by established principles, and such as the complaining party can show he has suffered within legal rules.

The function performed by the statute in question presents a very ordinary incident in judicial proceedings, in which proof of the measure of damages is readily adduced, and relief is given without difficulty or embarrassment. The ground upon which the State Court held the function of measuring damages, in the cases under consideration, to be beyond the reach of due process, has, therefore, no foundation in fact.

V.

In so far as the holding of the State court in favor of legislative authority to determine the measure of recovery in civil cases is rested on judicial precedent, that court has clearly misconceived the doctrines of the cases cited. The holding of the State court is unprecedented.

Reference was made by the State Court (printed Record, p. 83) to *Coover v. Moore & Walker,* 31 Mo. 574, and *Carroll v. Missouri P. R. Co.,* 88 Mo. 239, upholding a statute of the State of Missouri fixing the amount of damages at $5,000 in cases of death of persons occasioned by negligence, as authority for sustaining the Nebraska Statute under consideration. In the first of these cases (31 Mo. 574) the report shows that the injured person died June 5, 1857, and that the ruling on review was made in 1862, prior to the adoption of the Fourteenth Amendment, and at a time when the Constitution of the United States did not impose the requirement of due process upon the States. Naturally the case does not consider or determine this or any other constitutional objection. In the second Missouri case referred to (88 Mo. 246), decided in 1885, the Court remarked that the section of the statute fixing the amount of damages for death by negligence "has not been heretofore assailed on these or other grounds." The constitutionality of the section was then upheld, not upon an original consideration of the objections raised, but by reference to previous rulings sustaining Sec. 43 of the railroad law of that State imposing double damage for animals killed by wandering on railroad tracks in consequence of failure to fence as required by statute; and by reference to the circumstance that *Humes v. Railroad,* 82 Mo. 221, "has been recently affirmed in the Supreme Court of the United States." Let us then turn to the authoritative opinion of this Court which was delivered by Mr. Justice FIELD, in *Missouri P. R. Co. v. Humes,* 115 U. S., 512-523, and ascertain whether

that case is a precedent for upholding the Nebraska Statute under consideration.

In *Missouri P. R. Co. v. Humes,* 115 U. S. 512, the inapplicability of the due process clause of the Fourteenth Amendment to the double damage statute of Missouri was, in the opinion of the Court, so clear that it declined to hear argument by the defendant in error. The Act was sustained, however, solely upon the ground that it was a *police measure,* by which punishment was imposed for gross negligence to observe a wholesome police regulation. The following expressions, employed by Mr. Justice FIELD in the opinion (pp. 522, 523), embody the whole doctrine and philosophy of the decision:

> The law of Missouri, in requiring railroad corporations to erect fences where their roads pass through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the *general police power of the State* to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. * * * The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner *by way of punishment* for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. * * * The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.

We do not contest or question the correctness of the doctrine quoted. We concede that the Fourteenth Amendment does not abrogate the police powers of the States. But that doctrine is inapplicable to the statute of Nebraska under consideration, as we have shown by division II of this brief. Every statute of Nebraska imposing punishment by way of double or treble damages, or which gives the whole or any part of any fine or penal imposition to an informer, or private suitor, has been a dead letter and utterly null and void by force of the State Constitution. This Court by its unvarying rule yields to the supreme and final authority of the highest court of the State in the interpretation of the State Constitution and Statutes. The State is at liberty to determine for itself, by its organic law, whether its police powers shall be exercised by punitive impositions levied for the use and benefit of private persons. Having determined by its Constitution that the power so to do shall be withheld from the government, this Court has no power over that question of purely local policy, to put the rule of punitive damages in force in Nebraska. Suppose the present cases had been heard originally in a Circuit Court of the United States, where questions arising under the State Constitution could be considered. Even in that case, the Circuit Court of the United States, upon the original hearing, and this Court upon review, would be bound by the interpretations placed by the highest Court of the State on the provisions of the State Constitution (*Irrigation District v. Bradley*, 164 U. S. 159). The result in such case would be, that if upon an original examination of the Statute, unaided by any interpretation of the highest Court of the State, this Court should find it was a police measure and that the imposition of $10 per car for each hour delay was a punishment, it would be obliged to follow the local interpretation and condemn the act as a violation of the State Constitution. The State Court, to save the Statute from this condemnation, adjudged that the imposition was not a punishment, and that the act

was not an exercise of the police power of the State. Under that interpretation the statute must be here considered; and this precludes the application of the rule held in the Missouri cases referred to, and leaves the holding of the Nebraska Court upon the questions of due process unprecedented. The State Court, in its opinion in *Cram's case,* avowed that if the act in question provided for double damages, as did that of Missouri considered by Mr. Justice FIELD, it *would not hesitate* to pronounce it void under the rule established in *A. & N. R. Co. v. Baty,* 6 Neb. 37.

In *Brady v. Daly,* 175 U. S. 148, cited by the State Court as a precedent for determining the constitutional questions in favor of the validity of the statute, there was discussed and determined a question of jurisdiction only, as to which court, the District Court or the Circuit Court of the United States, had cognizance of the controversy. If the suit were for recovery of a penalty or forfeiture within the meaning of section 629 United States Revised Statutes, it was maintainable only in the District Court; while the Circuit Court had jurisdiction of suits at law or in equity arising under the patent or copyright laws. The suit was for damages for performing without assent of the proprietor a copyrighted dramatic composition, under a statute rendering the performer liable for damages, to be assessed at such sum as to the Court shall appear to be just, and "not less than one hundred dollars for the first and fifty dollars for every subsequent performance" (U. S. Rev. St., Sec. 4966). No point was made under the due process clause of the Fifth Amendment, and no constitutional question was raised or discussed. In considering an act of Congress no question could arise under the Fourteenth Amendment. The Court held that since the main purpose of the act was to compensate the proprietor for the violation of his copyright, it was a civil action for damages, as contradistinguished from a suit to recover a penalty or forfeiture. This conclusion was inevitable even though in assessing the amount of recovery

a punitive consideration was permitted to enter. Indeed the employment of the punitive element is conceded in the opinion as follows:

> Although *punishment,* in a certain and very limited sense, may be the result of the statute so far as the *wrongdoer* is concerned, yet we think it clear that such is not its *chief purpose,* which is the award of damages to the party who had sustained them.

The punitive element was an incident of the statute; but, as pointed out in *Missouri P. R. Co. v. Humes,* 115 U. S. 512, there was no restraint upon the power of Congress to add a punitive element of damages for the benefit of the injured person. A statute of Nebraska, however, which employed the punitive element for this purpose would come under the condemnation of the State Constitution. Besides the holding in *Brady v. Daly* followed English precedent, and made no express reference to our system of constitutional guaranties of the inviolability of private property. The force of the holdings of this Court, heretofore cited in this brief, that arbitrary legislative interference in fixing the measure of compensation or defining the elements of damage, is a usurpation of power denied by the Constitution, is in nowise lessened by the opinion determining that the Circuit Court has jurisdiction of civil suits arising under the copyright laws.

VI.

The Act in question denies to plaintiff in error the equal protection of the laws.

Legislation affecting a general right of property, such as the standard of compensation, must, where the element of punishment does not enter, be general. This is so because the constitutional guaranties of the right of property are general. The questions here involved are (1) the right of plaintiff in error to limit pecuniary recoveries against it to the amount of the injuries, if any, actually inflicted by it, and (2) to have a hearing upon that issue in the same forum and by the same procedure and rules which the State by its laws affords to all other suitors. On such subjects, of the fundamental rights of private property, no special statute adopting a peculiar rule of private property, applicable only to railroads, and denying to them the general rules of property applicable to all other persons within the State's jurisdiction, is permissible. Upon such subjects the guaranty of the equal protection of the laws operates generally and absolutely. The primary rights of property are not less sacred in their application to one class of property owners—railroads for instance—than to property owners generally. The same considerations apply necessarily to the sensitive attribute of measuring pecuniary recoveries by the extent of the injuries to be redressed. A general rule of jurisprudence to this effect, established by the laws of the State, cannot, through the instrumentality of special acts, be withheld from railroads without a disregard of the constitutional guaranty of the equal protection of the laws. Upon such general and sensitive attributes of property there can be no reason or foundation for classification, because the rights involved appertain to all property. The authorities already reviewed fully sustain this position, and the argument already made brings the act of Nebraska in question under the condemna-

tion of the guaranty of the equal protection of the laws, also found in the Fourteenth Amendment. (*Gulf C. & S. R. Co. v. Ellis*, 165 U. S., 150; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418.)

There is no need to reiterate the considerations already suggested which bring the act questioned under the condemnation of the due process clause, nor to undertake a further application of those considerations to the guaranty of the equal protection of the laws. The application of both clauses is evident.

VII.

The issue as to possibility of complying with the speed requirements is withdrawn.

Among the grounds of objection to the statute under consideration that are cognizable by this Court, and doubtless well assigned, is that the speed regulation is unreasonable, and imposes an undue burden because not possible to be complied with in practical railroad operation. The service given by mixed freight trains in Nebraska is necessarily attended with the burden of stopping to deliver and take up cars at all the sidings, and "spotting" cars and loading and unloading parcel and way freight. The present regulation makes it practically necessary to carry all livestock in exclusive, special trains, devoted to the livestock traffic. The general movement of livestock is from the localities where they are produced and toward the great livestock market of South Omaha. There are however lighter shipments of stockers and feeders outward from South Omaha, to the feeding farms and ranges, involving no doubt, daily shipments in car load lots. But these outgoing shipments are not sufficient in any case to employ whole trains on any of the roads. In practical operation it is unavoidable that they shall be carried in mixed trains, to local points on the main and branch lines, which can not possibly attain the prescribed

minimum average speed. It so happens that all the main trunk line railroads that operate in Nebraska have daily and unavoidably prolonged the period of transporting livestock beyond that prescribed by the Statute. One great railroad system having a line into South Omaha covering a course of four hundred miles through a cattle raising country in the State, and daily carrying cattle to that market, is said not to have been able to bring a single train within the statutory schedule since passage of the act in 1905. The accumulated benefits to stock shippers, provided by the act, are said to exceed a million dollars.

It seems, however, that in absence of proof of these facts, this Court would presume the reasonableness of the regulation and the ability of the railroads to attain the prescribed speed. Counsel who conducted the trials before the courts of original jurisdiction, felt justified in supposing that the act would meet the condemnation of the State Constitution, and so did not adduce proofs to show, from the standpoint of practical railroad operation, and the course of stock shipments as shown by actual experience, that it was not practical or possible to comply with the regulation. In this condition counsel do not feel justified in pressing that particular ground of objection upon this hearing. The propriety of withdrawing that contention from the consideration of the Court is emphasized by the known fact that other railroads have vast sums at risk, and ought not to be forestalled by a decision of the point based on a record perhaps insufficient to raise the point, and certainly not containing any adequate presentation. We see no escape from a condemnation of the act by the considerations arising on its face and already fully presented. It is, therefore, suggested that the Court withhold judgment upon this particular question until it may be properly presented by a record exhibiting proofs to indicate whether, in practical operation, the speed schedule is unreasonably oppressive.

VIII.

Recapitulation and Conclusion.

The authorities cited, and a consideration of the basic and fundamental doctrines of our constitutional system of government lead unavoidably to the following conclusions:

1. The prerogative of prescribing and fixing the measure of punishments, including pecuniary forfeitures, is a sovereign one, the exercise of which, while subject to wholesome restraints by the Constitution, is not attended with any requirement of notice or process. It is purely a legislative function involving political policy and the assertion of the power and majesty of government to compel submission to its laws. This, the argument of plaintiff in error concedes.

2. The construction of the Statute of Nebraska under consideration, held by the highest court of the State in the judgments under review, is authoritative and binding upon this Court on the present writs of error. That construction precludes this Court from upholding the statute complained of as an exercise of the police powers of the State or the imposition of punishment by pecuniary forfeitures in favor of private suitors. As construed by the highest court of the State the statute is a naked assumption of an arbitrary legislative prerogative to fix, in advance, without notice, the amount to be awarded in a civil proceeding in favor of one private suitor against another.

3. The Constitution of the State of Nebraska, under the construction held by its highest court in 1877 in *A. & N. R. v. Baty* (6 Neb. 37) and since adhered to and reaffirmed in the judgments under review, withholds from the State government power to impose any punishment by pecuniary forfeitures for the use or benefit of private persons, and reserves to the state the prerogative and duty of enforcing all punishments, including pecuniary forfeitures, in its own name and for its own use. If the validity of the statute had

come in question in a suit in a United States Circuit Court, so that its validity could have been tested here by the provisions of the Constitution of the State, then it must have been held void if interpreted as a police measure and operating as a punishment. So a conflict of decision upon the proper interpretation and operation of the state statute would operate to deprive plaintiff in error of the protection of the state constitution, and would be intolerable. The records, therefore, present for decision whether the assumption by the legislature, or any department of the State of Nebraska, of the arbitrary prerogative of determining in advance, without notice, as a purely compensatory feature, the amount that shall be payable by one citizen to another, is a violation of the requirements of due process and the equal protection of the laws contained in the Fourteenth Amendment of the Constitution of the United States.

4. Determination of the amount of the pecuniary differences or the amounts of unliquidated demands between individuals is a function that reaches and involves the property of the citizen and operates, in the broadest and most general sense, as a deprivation of property. To accomplish that end arbitrary power does not exist to determine a single element of damage, and much less the whole sum, as has been steadfastly maintained by this Court in the condemnation cases in which the issue has been raised. Arbitrary power over this incident of the right of property implies the power to disregard all rights of private property, and to abolish the rule of compensation. Arbitrary power to exercise this function is repugnant to the doctrine of the inviolability of private property, which is a corner-stone of our constitutional system of government. This attribute of property is, in our system, a general rule of constitutional policy and jurisprudence, not limited in its operation to any species of property or any class of citizens. No division of citizens into classes, so as to permit one class, and deny to another class, enjoyment of the principle of the inviolability

of property, is permissible. The right is a common heritage. In the assertion of this doctrine plaintiff in error can claim, of right, the equal protection of the laws of Nebraska that is accorded generally to her citizens, including the most marked legislative favorite. This function of measuring the amount of a civil debt, of fixing the sum that will justly recompense a private pecuniary injury, to be made out of the property of one citizen and paid to another, can only be accomplished on notice, in an appropriate forum, by proceedings conformable to the "law of the land." Such are the requirements of "due process of law" and "the equal protection of the laws" adopted by the Fourteenth Amendment as self-imposed restraints upon the exercise of arbitrary power by all departments of the state governments. The act in question comes in plain conflict with these provisions of the Constitution, is utterly null and void, and should be so adjudged.

Upon the grounds assigned the judgments of the Supreme Court of Nebraska, in each of the cases under review, should be reversed.

Respectfully submitted,

JAMES E. KELBY,
JOHN F. STOUT,
HALLECK F. ROSE,
Counsel for Plaintiff in Error.

INDEX.

CHAPTERS.

GENERAL.

AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

October Term 1911

No. 472

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Plaintiff in Error.*

VS.

WILBUR I. CRAM, *Defendant in Error.*

No. 473

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Plaintiff in Error.*

VS.

JAMES M. KYLE, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

In 1905, the legislature of Nebraska passed a law for the regulation of the shipment of live stock, in car load lots, which is as follows:

> "A Bill For An Act to regulate the carrying of Live Stock by railroad in the state of Nebraska, to fix the minimum rate of speed, and to provide damage for the violation of this act.

Be it Enacted by the Legislature of the State of Nebraska:

Section 1. It is hereby declared and made the duty of each corporation, individual, or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in said state in carload lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled including the time of stops at stations or other points, provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each twelve miles of the distance, including the time of stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule.

Provided, further, that upon branch lines not exceeding 125 miles in length, live stock of less than six cars in one consignment each railroad company in this state may select and designate three days in each week as stock shipping days and publish and make public the days so designated, and after giving ten days' notice of the days so selected and designated, shall be required upon its branch lines to conform to the schedule in this act provided, only upon said days so designated as stock shipping days.

Section 2. Any individual, corporation, or association of individuals violating any provisions of this act shall pay to the owner of such live stock, the sum

of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered." *Nebraska Session Laws, 1905*, Chap. 107, 506.

The unnecessary and inexcusable delay in the shipment of live stock, in utter disregard of the time schedules, prepared and published by the railroad companies, and the rights and interests of the stock shippers of the state, gave rise to said law. It was an attempt to require common carriers to keep faith with the public and furnish service approximating that advertised and shown by their published schedules, and thereby protect the shipper from the ruinous losses resulting from said delay. The act is very moderate in its provisions, as the speed required is considerable less than would be necessary if the time tables and schedules arranged and published by the carriers themselves were maintained. The state court has rightfully construed the law so that its provisions do not apply to cases where the delay results from the act of God, or causes over which the carrier has no control. But, notwithstanding the very moderate requirements of the law, the carriers made no effort to comply with its provisions and entirely ignored them. On the contrary, the abuses, which were sought to be corrected by it, have been more flagrant since its passage than before, as is shown by the record in the case at bar. One of Mr. Cram's cars of stock was kept sixty-eight hours on the road between Burwell and South Omaha, a distance of 229 miles, without any reason being given therefor. It is quite evident that the rail-

road companies deem the Gould law a presump
and unwarranted attempt, on the part of the legisla
to interfere with their private business, and tha
public has no rights which they are bound to re
The conduct of the defendant in error in this
indicates that it "has millions for defense", but i
willing to spend one dollar of it to give the p
proper service, or to pay the damages of the shippe
tained by its inexcusable violation of the require
of the law. It realizes that the trouble and expen
defendants in error, of such interminable litigati
has resulted in these cases, are greater than the am
involved, and that their experience will discourag
deter others from attempting to enforce their c
however meritorious they may be.

It is admitted by the pleadings, or proven by u
tradicted evidence, that plaintiff in error violate
provisions of said act, as alleged in the petitions
fendants in error. No reason or excuse for such
tion was attempted to be proven, the company re
wholly on the alleged unconstitutionality of the st
In the supreme court of Nebraska, counsel for the
pany contended that said act is inimical to six dif
articles of the state constitution, and that it violate
due process and equal protection clauses of the
amendment of the constitution of the United States.
supreme court of Nebraska held that said act doe
violate any of the provisions of the state or federa
stitutions. It is conceded that such holding conclu
determines that the act is not in conflict with the c
tution of Nebraska, and that the only question, wh
open to inquiry by this court, is whether said st

conflicts with the provisions of the 14th amendment above referred to.

A careful examination of the elaborate and ingenious argument contained in the brief of counsel for the company shows that the specific objections which, it is claimed, bring the statute within the prohibition of the 14th amendment, in the last analysis, may be reduced to the following: That the provisions of the statute, fixing the amount of recovery and precluding an inquiry by the courts, as to the question of damages, constitute an exercise of judicial power and functions by the legislature, and an invasion by it of the judicial department of the government. There are at least three good and complete answers to said objections which are as follows:

1. The constitution of the United States does not prohibit a state legislature from exercising judicial functions, and whether or not it has done so is not a Federal question.

2. The object of the statute is the regulation of *quasi* public corporations in the conduct of their business as common carriers, and its provisions are within the well established police power of the state.

3. A state legislature has the power to fix, by statute, the maximum, or even the exact, amount recoverable by a person sustaining injury in case of the delinquency of a public or *quasi* public agent, and such a statute does not violate any of the provisions of the 14th amendment.

We shall consider said propositions in the order stated.

I.

THE CONSTITUTION OF THE UNITED STATES DOES NOT PROHIBIT A STATE LEGISLATURE FROM EXERCISING JUDICIAL FUNCTIONS, AND WHETHER OR NOT IT HAS DONE SO IS NOT A FEDERAL QUESTION.

The foregoing proposition was stated by this court in *Saterlee* v. *Mathewson,* 12 Peters, 380, in the following language, to-wit:

> "There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions." *Calder* v. *Bull,* 3 Dall. 386, and *B. & S. Ry. Co.* v. *Nesbit,* 10 How. 400, are to the same effect.

Counsel refer to the fact that said cases were decided before the adoption of the 14th amendment. They seem to think that the prohibition of the exercise of judicial functions by any other department of a state government than the judicial was introduced into the constitution by said amendment, and that the above proposition does not now apply thereto. They have evidently overlooked, or disregarded, more recent decisions of this court, rendered long since the adoption of the 14th amendment, in which the same rule is announced, some of which we shall presently cite and quote from.

On pages 25 and 26 of their brief, counsel quote from five separate sections of the Nebraska constitution, one of which, to-wit, section 1, article 2, is as follows:

> "Section 1. The powers of the government of this state are divided into three distinct departments: the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Counsels' reference to said sections of the state constitution, and their argument that, by the act in question, the legislature undertook to exercise judicial functions, in violation of the section above quoted, were legitimate and proper in presenting the case to the state court. But, as the supreme court of Nebraska,—the tribunal having the right and power to finally determine whether said act conflicts with the state constitution,—has expressly decided that it does not, it is idle and useless to present said question to this court. Counsel insist that the state court erred in holding that the act does not conflict with section 1, article 2, of the state constitution and seem to think that said holding violates the provisions of the 14th amendment. In other words, by means of the 14th amendment, they seek to have this court review and set aside the action of the supreme court of Nebraska in construing the state constitution. That this will not be done, and that the provisions of the 14th amendment have no application to the question of whether or not the legislative, executive and judicial powers of a state shall be kept distinct and separate, are firmly established by the decisions of this court.

These propositions were considered in *Dryer* v. *Illinois*, 187 U. S. 71. In that case it was contended that the Indeterminate Sentence Act, of Illinois, conferred judicial powers upon persons who did not belong to the judicial department of the state government, in violation of constitutional inhibitions. Various portions of the Illinois constitution were referred to, among which is article 3, which is identically the same as artcle 2 of the Nebraska constitution above quoted. The following excerpt from the opinion of the court, by Mr. Justice Harlan, in said case, is a complete answer to the argument of counsel on this point:

"In this connection we are referred to article 3 of the constitution of Illinois, dividing the powers of government into three distinct departments—legislative, executive, judicial—and providing that 'no person, or collection of persons, being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted;' to section 1 of article 6 of the same constitution, providing that 'judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, county courts, justice of the peace, police magistrates and such court as may be created by law in and for cities and incorporated towns;' and to section 13 of article 5, providing that the pardoning power shall be in the governor of the state.

If we do not misapprehend the position of counsel, it is that the Indeterminate Sentence Act of 1899 is inconsistent with the above provisions of the state constitution, in that it confers judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invests them with pardoning power committed by the constitution to the governor of the state.

We will not stop to consider whether the statute is in conflict with the provisions of the state constitution to which reference is here made. We may, however, in passing, observe that a similar statute, previously enacted, was upheld by the Supreme Court of Illinois. *George* v. *The People,* 167 Illinois 447. It is only necessary now to say that even if the statute in question were obnoxious to the objection now urged by plaintiff in error, it would not follow that this court would review a judgment of the highest court of the state which expressly or by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department, with powers that are judicial

and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the constitution of the United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. *Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty.* 'When we speak', said Story, 'of a separation of the three great departments of government, and maintain that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of the one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' *Story's Const.* (5th ed.) 393. Again 'indeed, there is not a single constitution of ony state in the union, which does not practically embrace some acknowledgement of the maxim, and at the same time some admixture of powers constituting an exception of it.' *Story's Const.* (5th ed.) 393. *The objection that the act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any ques-*

tion under the due process clause of the Fourteenth Amendment."

The italics in said quotation are ours.

The Dryer case was cited, with approval, in *Reitz* v. *Michigan*, 188 U. S., 507; *Carfer* v. *Caldwell*, 200 U. S., 297; *Prentis* v. *Atlantic Coast Lines*, 211 U. S., 225; and *Soliah* v. *Heskin*, 222 U. S., 522.

In the Carfer case, it was contended that the legislature was attempting to exercise judicial functions in violation of constitutional prohibitions, but this court, by Chief Justice Fuller, said:

> "The circuit court was of opinion that the subject which the committee was appointed to investigate was not within the jurisdiction of the legislature, as defined by article 5 of the constitution of West Virginia, declaring that the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others. But that objection does not 'present any question under the due process of law clause of the Fourteenth Amendment.' *Dreyer* v. *Illinois*, 187 U. S. 71, 83; *Reitz* v. *Michigan*, 188 U. S. 505."

The first subdivision of the syllabus in the Prentis case, *supra*, is as follows:

> "So far as the federal constitution is concerned, a state may, by constitutional provision, unite legislative and judicial powers in the same body."

From the foregoing decisions of this court it is clear that the constitution of the United States, including the 14th Amendment, does not limit the exercise of judicial functions to the judicial department of a state government; and the question of whether a state constitution does so, or whether a statute violates the provisions of a

state constitution purporting to do so, is for the exclusive determination of the supreme court of the state, and its decision on this question will not be reviewed by this court.

As the claim of plaintiff in error, that the act in question conflicts with the 14th Amendment, is based wholly on its contention that said act constitutes the exercise of judicial powers, by the legislature; as the supreme court of Nebraska has expressly determined that said act does not violate the state constitution in this, or any other, respect; and as this court has decided that the constitution of the United States does not prohibit a state legislature from exercising judicial functions; it would seem that the petition in error should be dismissed, or the judgment of the state court affirmed, without further argument or consideration.

There are, however, at least two other conclusive reasons why the position assumed by the company is untenable, and which require the affirmance of the judgment herein, one of which is as follows:

II.

THE OBJECT OF THE ACT IN QUESTION IS THE REGULATION OF QUASI PUBLIC CORPORATIONS, IN THE CONDUCT OF THEIR BUSINESS AS COMMON CARRIERS, AND ITS PROVISIONS ARE CLEARLY WITHIN THE POLICE POWER OF THE STATE.

Preliminary to the discussion of the above proposition, we wish to call the attention of the court to the following rule, which should govern in determining whether said statute is in conflict with constitutional provisions, to-wit:

(a) *Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. When a statute is susceptible to two constructions, one making it constitutional and the other unconstitutional, the former must be adopted.*

This rule is firmly established in the jurisprudence of this country by the decisions of this court, and those of the supreme court of nearly every state in the union. In *Black's Constitutional Law,* Sec. 30, it is said:

> "Every presumption is in favor of the constitutionality of an act of the legislature.
>
> "Legislators, as well as judges, are bound to obey and support the constitution, and it is to be understood that they have weighed the constitutional validity of every act they pass. Hence the presumption is always in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against it; and the courts will not adjudge it invalid unless its violation of the constitution is, in their judgment, clear, complete and unmistakable."

The rule is stated in 8 Cyc., 801, as follows:

> "Statutes are always presumed to be constitutional, and this presumption will be indulged in by the courts until the contrary is clearly shown. This rule is one of universal application, and the principle is equally well established that statutes will be so construed, wherever it is possible to do so, so that they shall harmonize with the constitution, to the end that they may be sustained. Such a construction is regarded as a duty of the court, in passing upon the constitutionality of an act of the legislature."

And, on page 804 of the same work, we find the following:

> "It is presumed that a state legislature will not violate the federal constitution, and this presumption

is very strong, so much so that it is the duty of the court, where an act of a state legislature is assailed as being in violation of the federal constitution, to make every possible presumption against such violation."

The doctrine which was early adopted, and which has been constantly adhered to by this court, is clearly expressed in the opinion, by the present Chief Justice, in *United States* v. *Delaware*, 213 U. S., 407, as follows:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Comm. Comm.*, U. S. 407."

In the Jarman case, above referred to, this court, by Mr. Justice Brown, in referring to a statute of Missouri, the constitutionality of which was attacked, said:

"Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the

constitution is to be preferred. *Endlich on Statutes*, sec. 178. This rule was applied by this court in *Granada County Supervisors* v. *Brogden*, 112 U. S. 261; *Presser* v. *Illinois*, 116 U. S. 252, 269, and *Hooper* v. *California*, 155 U. S. 648, 657."

In *Hooper* v. *California*, 155 U. S., 657, in which the constitutionality of a statute of California was involved, this court said:

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

In *A. T. Etc. R. R. Co.* v. *Matthew*, 174 U. S., 104, the court, by Mr. Justice Brewer, said:

"It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it transcended its powers."

There is another well established principle of law which should be kept in mind when considering the above propositon which is that:

(b) *In all of its relations to the public, a railroad company has the character of a public agent, is a quasi-public corporation, and is subject to any reasonable legislative regulation or control.*

The correctness of the above proposition has been so often affirmed by the state courts, and by this court, where the right of the state to regulate and control the operation of railroads has been involved, that, in citing cases in its support, we are embarrassed only by their number. The following are some of the regulations of railroad corporations by legislatures and municipal councils which have been upheld by the courts, to-wit:

They have been compelled to fence their tracks; conduct examinations to ascertain qualifications of their employees; refrain from making flying switches; heat their cars by other means than stoves; stop trains at crossings; stop trains at each station on the line; construct farm crossings; light their cars in cities; keep tracks clear of weeds; keep flagmen at crossings; refrain from whistling except when necessary for brake signals or to prevent injury; not to permit escape of steam from cylinder cocks when in a street. The courts have also sustained laws fixing who may and who may not be deemed fellow servants; making the company absolutely liable for injury to passengers unless guilty of criminal negligence; regulating speed of trains; establishing maximum freight and passenger rates; requiring a change of grade crossings; requiring signals to be given at crossings; compelling switches to be built to connect with other lines; run separate passenger and freight trains; run passenger trains so as to make connections with other lines; build and maintain water closets at stations; build and maintain depots; build side-tracks to elevators; place blackboards in stations and register thereon the time when their trains will leave; furnish cars to shippers within a fixed time; making initial carrier liable for loss beyond its line; furnish terminal facilities; furnish separate accommodations for whites and blacks; forbidding the giving of free passes; limiting the hours of labor of employees and the running of trains on Sunday; and providing for many other regulations for the safety, welfare, comfort and convenience of the public. *2 Elliott on Railroads*, Sec. 662, 670; 7 Cyc. 447, 448.

The propositon of law above stated is so firmly established and well understood that it is probably unneces-

sary to cite authorities in its support, and, of the numerous decisions of this court on the subject, we shall content ourselves by referring to the following: *C. B. & Q. Ry. Co.* v. *Iowa,* 94 U. S., 113; *Gladsen* v. *State,* 166 U. S., 427; *Wisconsin Etc. Ry. Co.* v. *Jacobson,* 179 U. S., 287; *Atlantic Etc. Ry. Co.* v. *North Carolina Com.,* 206 U. S., 1.

In the last case cited, the railroad commission of North Carolina undertook to regulate and control the time of running the trains of plaintiff, so as to make connections with the trains of another railroad company, for the convenience of the traveling public, and made an order to that effect which was sustained by the supreme court of North Carolina. The railroad company insisted that such order and judgment violated the provisions of the 14th Amendment, and brought the case to this court on writ of error. The court held that the time and manner of running railroad trains, for the benefit and convenience of the public, are proper subjects of a state regulation and affirmed the judgment. We quote from the opinion in said case, as follows:

> "All the assignments of error challenge the correctness of the decision below on the ground of its repugnancy to the due process or equal protection clauses of the 14th Amendment. The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Legislative power to regulate and control *quasi-public* corporations is not confined to railroad companies alone, but extends to banks, elevator, insurance, gas, water, telephone and telegraph companies, and all corporations engaged in business of a public nature. *Munn* v. *Illinois*, 94 U. S., 113; *Orient Ins. Co.* v. *Daggs*, 172 U. S., 557; *German Alliance Ins. Co.* v. *Hale*, 219 U. S., 307; *Noble State Bank* v. *Haskell*, 219 U. S., 104.

(c) *The right of the legislature to regulate and control a business affected with a public interest is a part of the police power of the state.*

The police power of a state is not limited to the enactment of laws or regulations for the purpose of protecting the public health, morals and safety, but also extends to regulations designed to provide for the public comfort and convenience and to promote the general prosperity and welfare of the public. The holdings of this court upon this proposition, are summarized in 9 Enc. of U. S. Sup. Ct. Dec., 483, as follows:

> "The states of the union have the right to control all of their purely internal affairs, and, in so doing, to protect the property, lives, health, morals and safety of their people, and to suppress crime and disorder by regulations that do not interefere with the execution of the powers of the general government or violate rights secured by the constitution of the United States. The police power of the states is not, however, limited to these subjects only. The power of the state, by appropriate legislation, to provide for the comfort and convenience, and to promote the general prosperity and welfare of its inhabitants stands upon the same ground, precisely as its power by appropriate legislation to protect the public health, the public morals and the public safety, and whether legislation of either kind is in-

consistent with any power granted to the general government is to be determined by the same rules. Indeed, the purposes for which the police power may be invoked are almost infinite, and the power to establish police regulations reaches everything within the territorial limits of the state not surrendered to the general government."

Numerous decisions of this court are cited, in support of said summary of the law, among which are:

Lake Shore Etc. R. Co. v. *Ohio,* 173 U. S., 285.

Lake Shore Etc. R. Co. v. *Smith,* 173 U. S., 684.

Western Union Tel. Co. v. *Pendelton,* 122 U. S., 347.

C. B. & Q. R. Co. v. *Drainage Com.,* 200 U. S., 561.

Bacon v. *Walker,* 204 U. S., 311.

In the Lake Shore case, 173 U. S., 296, 297, this court, after citing and reviewing several former cases, said:

"Now, it is evident that these cases had no reference to the health, morals or safety of the people of the state, but only to the public convenience. They recognized the fundamental principle that outside of the field directly occupied by the general government under the powers granted it by the constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and that its legislative enactments relating to those subjects, and which are not inconsistent with the state constitution, are to be respected and enforced in the courts of the union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the national constitution. The power here referred to is—to use the words of Chief Justice Shaw—the power 'to make, ordain and establish all manner of wholesome and reasonable

law, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.' *Commonwealth* v. *Alger*, 7 Cushing, 53, 85. Mr. Cooley well said: 'It cannot be doubted that there is ample power in the legislative department of the state to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.' *Cooley's Const. Lim.* (6th ed.), p. 751. It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

In the Smith case, 173 U. S. we find the following:

"The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. As stated by Mr. Chief Justice Taney, in the course of his opinion in the License cases, 5 How. 504, 583, in describing the powers of a state: 'They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the

power of sovereignty, the power to govern men and things within the limits of its dominion."

Mr. Justice Harlan, speaking for the court in the C. B. & Q. Ry. Co. case, 200 U. S., 592, said:

> "The learned counsel for the railway company seem to think that the adjudications relative to the police power of the state to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. *Lake Shore & Mich. South. Ry Co.* v. *Ohio*, 173 U. S. 285, 292; *Gilman* v. *Philadelphia*, 3 Wall. 713, 729; *Pound* v. *Turck*, 95 U. S. 459, 464; *Railroad Co.* v. *Husen*. 95 U. S. 470. And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

This court, by Mr. Justice McKenna, in *Bacon* v. *Walker*, 204 U. S., 317, after referring to several of its former decisions on the subject, said:

> "These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Company* v. *Drainage Commissioners*, 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exrcised for the general well-being of the community. That power, we said, embraces regulation designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

In *Bank* v. *Haskell, supra*, a statute of Oklahoma requiring banks to contribute to a fund for the purpose of guaranteeing bank deposits, was held to be within the police power. In the opinion, by Mr. Justice Holmes, it is said:

> "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

This language applies with equal force to the statute in question requiring the shipment of live stock within a reasonable time, which is certainly necessary to enforcing the primary conditions of successful commerce in that commodity.

In *German Alliance Ins. Co.* v. *Hale*, 219 U. S., 307, a statute of Alabama regulating the business of insurance companies was held to be a legitimate exercise of

the police power of the state. This court, by Mr. Justice Harlan, in said case, page 317, said:

> "Insurance companies, indeed, all corporations, associations and individuals, within the jurisdiction of a state, are subject to such regulations, in respect of their relative rights and duties, as the state may, in the exercise of its police power and in harmony with its own and the federal constitution, prescribe for the public convenience and the general good. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27, 31; *Lake Shore &c.* v. *Ohio*, 173 U. S. 285, 279; *House* v. *Mayes*, ante. p. 270."

Gladson v. *Minnesota*, 166 U. S., 427, involved the constitutionality of a statute of Minnesota requiring every railroad company to stop passenger trains, running wholly within the state, at its stations at all county seats. This court held that said statute is a reasonable exercise of the police power of the state. In the opinion, by Mr. Justice Gray, after referring to the general power of the state to regulate the operation of railroads, said:

> "It may prescribe the location and the plan of construction of the road, the rate of speed at which the train shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state."

The fact that the company was organized under the laws of another state does not affect the right to regulate it, as was held by this court in *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S., 334, where, in reference to the power of a state over such a corporation, it is said:

> "So it (the state) may make all needful regulations of a police character for the government of the company while operating its road in that jurisdic-

tion. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others."

Professor Freund, in his work "Police Power," Sec. 398, says that this extension of the police power, to regulations promoting the comfort or convenience of the public, is limited to business affected with a public interest. We quote as follows:

> "It may thus be concluded that the police power for the public convenience may be exercised only with regard to a business affected with a public interest, and that for this purpose again a business affected with a public interest is one which enjoys either special privileges or a virtual monopoly."

The right of the legislature, under the police power of the state, to regulate the operation of railroads, is thus stated in 33 Cyc., 648:

> "The legislature may under the police power of the state subject railroad companies to all such regulations as are reasonable and necessary to promote the public safety, the safety of passengers, property, and the company's employees, and generally to compel the proper performance of their duties to the public and effectuate and promote the object of their creation. The right extends to matters affecting the public convenience as well as the public safety, and such police regulations are valid notwithstanding they may incidentally affect and to some extent interfere with the transportation of interstate traffic."

Various authorities are cited in support of said statute among which are:

Gladson v. *Minnesota,* 166 U. S., 427.
New Etc. R. Co. v. *New York,* 165 U. S., 628.
Harrington v. *Georgia,* 163 U. S., 299.
Smith v. *Alabama,* 124 U. S., 465.

The right of a state to regulate rates which may be charged by a public service corporation is recognized in many decisions of this court as a part of the police power of the state. Referring to the case of *Munn* v. *Illinois, supra,* Mr. Justice Bradley, in the Sinking-Fund Cases, 99 U. S., 747, said:

> "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

From the foregoing authorities, and from many others which might be cited, it is clear that the enactment, by the legislature of Nebraska of the statute in question herein, was an exercise of the police power of the state to compel a common carrier, whose business is affected with a public interest, to properly perform its duties to the public and to effectuate and promote the object of its creation. It is within the scope of police regulations such as the fixing of rates, requiring railroads to make connections, stop trains at stations, and many other requirements, which have been upheld by this court, which have no reference to the health, morals or safety of the

people but only to the comfort, convenience and general prosperity of the public.

The act in question is therefore a police regulation. The clearly expressed object and purpose of section 1 is to require the company to furnish proper service to the public. The necessity for, and reasonableness of, this regulation is presumed, and the burden of proving the contrary is on the company. Counsel, on page 83 of their brief, admit that, so far as the records in the instant cases are concerned, there is nothing to show that the same is unreasonable or cannot be complied with, and seek to withdraw said question from the consideration of the court.

Section 1 of said act, which specifies the service required to be performed must, in the cases at bar, be presumed and held to be a reasonable and proper exercise of the police power of the state. The question of the constitutionality of the act is, therefore, limited to the provisions of section 2. Said section is as follows:

> "Section 2. Any individual, corporation or association of individuals violating any provisions of this act shall pay to the owner of such live stock, the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered."

This section embodies the only provisions of the act for the enforcement of the several regulations contained in section 1, and it is the constitutionality of said section alone which is raised by the brief of counsel for the company. As we have heretofore seen, their position is based on the alleged invasion of the judicial department by the legislature in fixing the amount of recovery by

a party injured by a violation of the requirements of section 1. The state court decided adversely to counsel's contention on this point, and we have heretofore shown by the decisions of this court that said judgment will not be reviewed herein. But, if said question were open to inquiry, it requires but the application of well settled principles and rules of law, announced in numerous decisions of this court, to show that the company's position is untenable, and its contention on this point is wholly without merit.

It is plainly apparent that the object and purpose of said section 2 are to enforce the regulations provided for in section 1, and to furnish a simple and expeditious remedy to a party injured by a violation thereof.

It is a matter of common knowledge that the ordinary and usual method of enforcing a police regulation, of the character of that under discussion, is by providing a penalty for its violation, the same to be recovered by an action in the name of the state, the informer, or the party who has been injured by the delinquency. That this method of enforcement does not in any manner conflict with the 14th amendment, or any other provision of the Federal Constitution, is well established by repeated decisions of this court. *Mo. Pac. Ry. Co* v. *Hume,* 115 U. S. 512; *Minneapolis &c. Ry. Co.* v. *Emmons,* 149 U. S. 312; *Minneapolis &c. Ry. Co.* v. *Beckwirth,* 129 U. S. 31. It is therefore clear that, if section 2 of the Nebraska act provides for a penalty, it is not inimical to the constitution of the United States. Counsel for the company strenuously insisted, in the state court, that the so-called liquidated damages provided for by said section, are, in fact, in the nature of a penalty and, on page 23 of their brief herein, say:

"Upon an original and independent inquiry this court might be constrained to hold the imposition of ten dollars per car for each hour of delay punitive in character, intended to stimulate exertion to conform to the statutory speed schedule. That view was urged by counsel without success, before the state court, in an effort to bring the statute within the condemnation of the constitution of Nebraska. The state court agreed with counsel that if the imposition was penal in character, it would be void because forbidden by the state constitution."

We take issue with counsel on the statement made in the last clause of the above quotation, and insist that the state court did not hold that said imposition was not penal in character, nor that if it were so it would violate the state constitution, as we shall show in a later part of this brief. But if it be admitted, for the purpose of argument, that said statement is correct, is it true that this court is precluded from making an independent investigation as to the nature of such imposition? Counsel cite several cases in suppost of their contention that this court is bound to accept the construction of the state court that said imposition is liquidated damages and not a penalty, one of which is *Illinois &c. R. Co.* v. *Illinois*, 163 U. S. 152. In that case a statute of Illinois, which required railroad trains to stop at county seats, was under consideration. In the opinion in said case, it is said:

"The supreme court of the state, however, held that the statute not only required every train to stop at every county seat at which it arrived, but that, as Cairo was admitted to be a county seat, the statute required every train passing through the city of Cairo to go and stop at the station in that city. The construction given to the statute in this particular by the state court does not involve any federal question, and must be accepted by this court in judging of the constitutionality of the statute."

The foregoing is fairly illustrative of all of the authorities cited upon this proposition. Counsel seek to have the court apply this rule, where the acceptance of the holding of the state court would benefit the company, but ask the court to disregard it and make independent inquiry when to do so would be to the interest of their client. On pages 38, 48 and 72 of their brief, they cite *Fall-Brook Irr. Dist.* v. *Bradley,* 164 U. S. 159, in support of the rule that this court is not bound to accept the opinion of the state court as to the scope and purpose of a statute, but forms its own independent judgment thereon. The analogy between the situation in the instant case to that in the Bradley case is maintained by counsel. On page 72 of their brief they say:

> "The legal aspect of the situation is precisely analogous to the case in which a state court determined that a tax assessment for a water project was not subject to the requirement of due process, because imposed for a public use. Had the imposition been for a private use, as asserted by the property owner, the guaranty of due process would have invalidated it. This court reserved to itself the function of determining, according to its own views, the issues upon which the applicability of the constitutional requirement depended, and in *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 159, said:
>
> " 'We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and as incident thereto, what is a public use. As here presented these are questions which also arise under the federal constitution, and we must decide them in accordance with our views of constitutional law.' "

This rule is also announced in *Atchison, Etc. R. Co.* v. *Matthews,* 174 U. S., 96, 100; and *Huntington* v. *Attrill,* 146 U. S., 657, 682.

In the Matthews case, *supra,* this court by Mr. Justice Brewer, after distinguishing a statute of Kansas providing for the recovery of damages and an attorney's fee in an action, against a railroad company, for damages by fire caused by the operation of its road, from a Texas statute of somewhat similar import, said:

> "It may be suggested that this line of argument leads to the conclusion that a statute of one state whose purpose is declared by its supreme court to be a matter of police regulation will be upheld by this court as not in conflict with the federal constitution, while a statute of another state, precisely similar in its terms, will be adjudged in conflict with that constitution if the supreme court of that state interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the supreme court of the state. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 366. It forms its own independent judgment as to the scope and purpose of a statute, while of course leaning to any interpretation which has been placed upon it by the highest court of the state. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment."

This court is thus committed to the doctrine that it is not bound by the holding of the state supreme court that the purpose for which a state statute authorizes the levy of a tax on property is a public use; nor by the holding of such a court that a state statute is or is not a police regulation; that this court is not concluded by the opin-

ion of the supreme court of the state on said questions, but forms its own independent judgment as to the scope and purpose of the state statute. Are not the questions of whether the Nebraska act under consideration is a police regulation, and whether section 2 thereof provides for a penalty, strictly within the doctrine thus announced? The determination of whether the act is a police regulation comes within the express terms of the above quotation, and the question of whether it provides for a penalty comes within the principle enunciated in said cases.

A police regulation, and a provision therein imposing a penalty to prevent its violation, are to protect the public interest. Liquidated damages are for the benefit of private individuals. Under the rule above stated, this court is not concluded by the opinion of the state court in its interpretation of the scope or purpose of the statute, but should form its own independent judgment as to whether the statute is a police regulation and as to whether it provides for a penalty or otherwise. The test to be applied in determining this matter is thus stated by Mr. Justice Gray in *Huntington* v. *Attrill*, 146 U. S. 683:

> "The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."

A statute of New York provided that the officers of a corporation who shall sign and make a false certificate or report shall be jointly and severally liable for the debts of the corporation. In *Garrison* v. *Howe*, 17 N. Y. 458, the court of appeals of New York held that said provision is highly penal; and in *Jones* v.

Barlow, 62 N. Y., 202, it held that "the act is penal against the defaulting trustees but is remedial in favor of creditors." The plaintiff in *Huntington* v. *Attrill*, supra, commenced an action, in Maryland, to enforce a judgment obtained in New York under the provisions of said statute. The Maryland courts held that said judgment was for a penalty which would not be enforced by the courts of a sister state and dismissed the case. On error to this court from said decision the question was ably considered and the conclusion reached that this court was not concluded by the opinion of the court of appeals of New York or Maryland that said statute is penal, but should, upon inquiry, form its own independent judgment as to the scope and purpose of the act, which was adverse to that of the state courts. The fourth and fifth subdivision of the syllabus in said case are as follows:

> "Whether a statute of one state is a penal law which cannot be enforced in another state is to be determined by the court which is called upon to enforce it.
>
> "If the highest court of a state declines to give full faith and credit to a judgment of another state, because in its opinion that judgment was for a penalty, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself whether the original cause of action was penal in the international sense."

The scope and purpose of the Nebraska act are to regulate the operation of the business of common carriers, to protect the interests of the public, and to enforce said regulation. Section 1 of said act imposes a certain duty on the carrier; and the object and purpose of section 2 are to compel the performance of said duty, and to furnish a simple and expeditious remedy to a

party injured by non-performance of the duty imposed. The method adopted for the enforcement of said police regulation may not be the best that could be devised, but that is no reason why the court should declare it nugatory. Speaking of a statute of Alabama providing for a recovery, in an action on an insurance policy, in addition to the actual loss, of twenty-five per cent of the amount of such loss, if the company belonged to a tariff association that fixed prices, this court, by Mr. Justice Harlan, in *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 317, said:

> "It was for the state, keeping within the limits of its constitutional powers, to say what particular means it would prescribe for the protection of the public in such matters. The court certainly cannot say that the means here adopted are not, in any real or substantial sense, germane to the end sought to be attained by the statute. These means may not be the best that could have been devised, but the court cannot, for any such reason, declare them illegal or beyond the power of the state to establish."

If, upon independent inquiry, this court shall determine that the recovery provided for by section 2 of the Nebraska act is in the nature of a penalty, as has been so strenuously insisted upon by counsel for the company, then its former decisions are conclusive that it does not violate the 14th Amendment.

On the other hand, if this court holds that it is bound to, and does, follow the construction placed upon the statute by the supreme court of Nebraska, it will not strengthen the company's position in the slightest. Counsels' argument is based wholly upon the false premises that said court has held that the act in question is not a police regulation; that the same is not penal in its nature; and that if it were in any sense penal it would

violate the constitution of Nebraska. An examination and analysis of the opinion of the state court in the case at bar, and of all of its decisions bearing on the subject, cannot fail to convince this court that the premises so assumed by counsel are false, and that their conclusion drawn therefrom is also wrong. To determine the truth or falsity of these conflicting assertions and contentions it is necessary to answer the following inquiry, to-wit:

III.

WHAT IS THE CONSTRUCTION PLACED UPON THE ACT IN QUESTION, AND SIMILAR STATUTES, BY THE SUPREME COURT OF NEBRASKA?

A careful examination of the opinions of the state court, found on pages 78-85 and 93-99, of the abstract, shows that it is neither affirmed or denied therein that the statute is or is not a police regulation; nor that it is or is not penal in its nature; nor that if it were penal it would or would not violate the state constitution. None of the terms "police power", "police regulation", "penal" or "penalty" are found in said opinions. Counsels' contention that the court did so hold is based upon the fact that the recovery is termed "liquidated damages" and from the following statement in one of said opinions, to-wit:

> "Counsel for defendant argue that the statute purports to give more than compensatory damages and therefore is controlled by *Railroad Company* v *Baty*, 6 Neb. 37, but that case merely disapproved a statute that purported to give double damages, and if the act under consideration provided for the recovery of double or treble damages, we would not hesitate to apply the earlier case to the instant one Such is not the case."

Counsel seem to think that the foregoing is equivalent to saying that if the statute provided for anything more than compensatory damages, or was in any sense penal, it would be unconstitutional. But that such conclusion is wholly unwarranted is conclusively proven by an examination of the former decisions of said court, some of which were cited, with approval, in its opinion in the cases at bar, in which penal, or quasi penal, statutes have been upheld.

In *Graham* v. *Kibble*, 9 Nebr. 184, one of the cases so cited, the constitutionality of the following statute was upheld:

> "'If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand and take any of the fees hereinbefore ascertained and limited, when the business for which such fees are chargeable shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts for the same amount are recoverable at law."

In the opinion in said case it is said:

> "It may be true that such statutory allowance is much in excess of the actual loss sustained or injury done, and therefore, to the extent that it is so, in its effect upon the offending officer, is in the nature of a penalty. But the power of the legislature to fix the maximum, or even the exact amount recoverable by a private person sustaining injury, or that shall accrue to the public in case of official delinquency, cannot be successfully questioned."

Phoenix Ins. Co. v. *Bowman*, 28 Nebr. 251, was an action brought under the same statute. In regard to

the nature of said act, the court, in the second subdivision of the syllabus, said:

> "While an officer taking illegal fees is liable to the full penalty of the law, yet the statute, being highly penal in its nature, will not be extended by construction or implication beyond the clear import of its language."

A like holding, in regard to the penal nature of the statute, is found in *Phoenix Ins. Co.* v. *McEvony,* 52 Nebr. 566.

In Nebraska the points of law decided in a case are expressed in the syllabus, which is prepared by the judge who writes the opinion, and is approved by the concurring judges.

From the foregoing it will be seen that, although said statute permits the party injured to maintain an action in his own name, and recover the $50.00 provided for, as "debts for the same amount are recoverable at law," and the same is construed as "highly penal, in its nature," yet the state court holds that it does not violate the Nebraska constitution.

On pages 37 and 38 of their brief first filed in this court by counsel for the company, in reference to the case of *Graham* v. *Kibble, supra,* it is said:

> "An officer extorted excessive fees. To prove that he had done so two facts must be established: (1) The amount of the lawful charges, and (2) that a specified excessive sum was in fact collected. It is not possible to prove a case under the extortion statute without at the same time proving the amount of the overcharge, which is the precise amount of the actual damage. Yet, strange and ironical as it seems to one whose processes are normal, the court solemnly holds that the amount of recovery is not a penalty, and upholds the statute as a valid liquida-

> tion of damages in 'circumstances which preclude the ascertainment of the actual damage suffered.' Notwithstanding apparent absurdities, the state court, in the cases under review, affirms this as the sole justification for fixing the amount of recovery by the legislative act or decree here in question. * * * In *Graham* v. *Kibble* (9 Neb. 188) the opinion quotes the specific finding of the trial court: 'That defendant demanded and received from said plaintiff for such service the sum of one dollar and sixty cents; that he was entitled by law to charge therefor and for such service the sum of eighty cents and no more.' Indeed it was not possible to prove the taking of excessive fees, except by showing these two elements, which demonstrate, necessarily, that eighty cents measured the extent of actual injury and damage. If that case had come here for review, this court, on the face of the statute and the record, would not have been bound by the dogmatic and false assumption of the state court, based on supposed judicial knowledge, that the circumstances precluded production of proof of the amount of actual damage."

If counsel had not overlooked, or ignored, the portions of the decisions of the state court above quoted, wherein it is stated that said statute is penal in its nature, and that the fixed damages therein provided for may, and often do include a penal sum, they would not have asserted that "the court solemnly holds that the amount of the recovery is not a penalty," and their criticism of the mental processes of the members of the court would probably have remained unuttered. Possibly a more careful examination and fuller understanding of said cases explain the substitution of a later brief, from which said assertion and criticism are omitted.

Clearwater Bank v. *Kuronski*, 45 Nebr. 1, cited with approval in the opinion of the state court, involved the

constitutionality of the following provisions of a statute, to-wit:

> "Any mortgagee, assignee, or their legal personal representatives after full performance of the conditions of the mortgage, who, for the space of ten (10) days after being requested, shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs, or assigns in the sum of fifty ($50.00) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action."

It will be noted that this statute authorizes an action, by one private individual against another private person, for all actual damages sustained by the former for the failure of the latter to perform a duty imposed upon him by said statute and, in addition to said actual damages, he is permitted to recover $50.00. It is plain that this additional sum so fixed, although called liquidated damages, is in the nature of a penalty for the non-performance of a statutory duty. Yet the supreme court holds that said provisions of the statute do not conflict with the state constitution. The second subdivision of the syllabus, which is a statement of the law by the court, is as follows:

> "That portion of section 15, chapter 32, Compiled Statutes, which gives to the mortgagor of chattels a right of action to recover the sum therein prescribed as liquidated damages for a failure of a mortgagee or his assignee to enter satisfaction of record of a chattel mortgage which has been paid within ten days after being thereto requested, does not conflict with section 3, article 1, nor with section 5, article 8, of the constitution of this state. *Graham* v. *Kibble*, 9 Neb. 182, followed."

It should not escape observation that section 3, article 1, of the state constitution, referred to by the court, is the due process of law provision of the Nebraska constitution which counsel contend said court has held would be violated by a statute permitting the recovery of a penalty by a private person. Said case is a complete answer to, and refutation of, said contention. In said opinion, the court said:

> "The next point made is that the measure of recovery is the amount of loss incurred, and no actual damages having been proved, there can be no recovery in this case. If the petition had been framed under the clause of the statute allowing the mortgagor to collect the actual damages sustained, the plaintiff would be limited in his recovery to such sum as would fully compensate him for his injury or loss, and it could not be increased by awarding punitive or exemplary damages. But such is not the form of the action. The suit is brought alone to recover the sum fixed by the statute for the failure to discharge a mortgage, and it was not necessary to prove upon the trial the amount of pecuniary injury suffered. The fact that the act gives the money, when recovered, to the party injured, does not make the law conflict with the provisions of section 5, article 8, of the state constitution. *(Graham* v. *Kibble,* 9 Neb. 182.)"

In the third subdivision of the syllabus, in *Deering* v. *Miller,* 33 Nebr. 655, in reference to the said statute, the court said:

> "The statute which provides for a penalty in case the mortgagee, etc., delay releasing the mortgage for a certain number of days, is merely cumulative and will not prevent a recovery for actual damages."

A statute of Nebraska provides that if, after a party has been set at large upon habeas corpus, any person

shall re-arrest or imprison him for the same offense, said person "shall forfeit to the party aggrieved five hundred dollars." The case of *Hier* v. *Hutchings,* 58 Nebr. 334, was brought under said statute. Hutchings had been released on *habeas corpus,* and Hier re-arrested him for the same offense. The supreme court affirmed a judgment of $500.00 obtained against Hier by virtue of the provisions of the statute. The language of the statute is "he shall forfeit to the party aggrieved five hundred dollars," and it is clearly apparent that such forfeiture is penal, or quasi penal, as the amount thereof may greatly exceed the actual damages sustained, yet the supreme court upheld the statute.

Many other decisions of the supreme court of Nebraska might be cited wherein a penal or quasi penal statute, which provided for an action and recovery in the name of the party aggrieved, has been upheld. But the three cases above referred to, which were cited with approval by the state court in the case at bar, are sufficient to establish, beyond question, that said court did not hold that the act under consideration is not penal or quasi penal in its nature, and effectually disproves counsels' contention that it is the rule of said court that, if it were penal, it would be within the condemnation of the state constitution.

While it is true that, in the statutes considered in the Kibble and Kuronski cases, *supra,* the recovery is termed "damages," and the court so terms same in its opinion, yet, as the $50.00 permitted to be recovered is in addition to actual damages, the same is in the nature of a penalty for violation of a statutory provision, and the court holds that said statutes are penal, or "highly penal," as it is expressed in one of the cases above quoted from.

The term "forfeit" is used in the statute considered in the Hutchings case, *supra,* but the court calls the recovery damages. The scope and effect of the statute, rather than its form, or the terminology employed therein, or by the court in construing it, must govern.

That the act under consideration is similar in principle to those passed upon in the Kibble, Kuronski and Hutchings cases, *supra,* is expressly held by the court, and cannot be successfully controverted by anyone. It is therefore clear that, if the constitutionality of the statute in question be considered in the light of the former decisions of this court alone, or that of the decisions of the Nebraska court heretofore cited, it is not inimical to the provisions of the 14th Amendment. Counsel practically admit that, if the recovery provided for be considered penal in its nature, it does not violate said amendment; but, wholly ignoring the former decisions of the state court above referred to and cited in its opinion herein, counsel insist that, if it were so construed, it would be within the condemnation of the state constitution. This contention is based wholly upon the general rule, adopted by the courts of Nebraska in ordinary civil actions, that, when the actual damages sustained have been determined by a court or jury, no further sum can be added thereto by way of punishment, and the holding of the court, in two former cases, that a statute giving double damages is unconstitutional.

The common law rule that, in cases showing wanton or malicious injury, punitive damages may be allowed,—which is still recognized and adhered to by this court and the courts of many states,—has been abrogated in some jurisdictions, among which is Nebraska. *Boyer* v. *Barr,* 8 Nebr. 68, is the case in which said rule was first

considered and the policy of the state in regard thereto was determined. The question arose over an instruction of the trial court, in a civil case for assault and battery, by which the jurors were instructed in regard to all of the elements of actual damages, and directed that, after determining the amount of such compensatory damages, they might add thereto "other damages as of a punitive or exemplary character." The supreme court disapproved of that part of said instruction which permitted the jury to add to the amount determined as the actual damages sustained by plaintiff, any further sum as a fine for the punishment of the defendant. The rule announced in this decision has been followed and is the law in Nebraska. Said rule is in harmony with that adopted in *A. & N. R. Co.* v. *Baty,* 6 Neb. 37, so much discussed and relied on, by counsel for the company, in the cases at bar. In the Baty case, a statute of Nebraska giving to the owner of live stock "double the value of his property injured, killed, or destroyed" on a railroad track, in case the same is not paid within thirty days after demand, was held to violate section 5, article 8, of the Nebraska constitution,—which provides that all fines and penalties shall be appropriated to the school fund,—and also of section 3, article 1, which is as follows:

> "No person shall be deprived of life, liberty or property, without due process of law."

The holding of the court in said case, that said statute is in conflict with section 5, article 8, of the state constitution, was expressly overruled in *Graham* v. *Kibble,* 9 Neb. 186, but the decision that said statute is inimical to the due process clause of the constitution has been adhered to.

It will be noted that said section 3, article 1, of the Nebraska constitution, is identically the same in principle as the due process clause of the 14th Amendment to the constitution of the United States. As this court, in *Minn. Ry. Co.* v. *Beckwith,* 129 U. S. 27, held that a statute of Iowa, substantially like the Nebraska act considered in the Baty case, does not violate the 14th Amendment, nor any other provision of the federal constitution; and, as this court, in numerous decisions, is committed to the doctrine that punitive or exemplary damages may be recovered, it follows that the decisions of the Nebraska court in *Boyer* v. *Barr,* 8 Nebr. 68, *A. & N. R. Co.* v. *Baty,* 6 Neb. 37, and similar cases, where the recovery of punitive and double damages is disallowed, are in conflict with, and diametrically opposed to, the rule of damages in force in this court, and the construction placed by it on like provisions of the federal constitution. We also wish to call the attention of the court to the fact that, if the recovery provided for by the act under consideration, and the other Nebraska statutes passed upon in *Graham* v. *Kibble,* and other kindred cases hereinbefore cited, is considered penal, or quasi penal, in its nature, said decisions of the Nebraska court therein are in full harmony with the holdings of this court. Counsel contend that the decisions of the Nebraska court in the instant case, *Graham* v. *Kibble,* and others of like import, are inconsistent and in conflict with its construction of the due process clause of the state constitution as announced in *A. & N. R. Co.* v. *Baty,* and kindred cases. If this be true, how does it aid counsels' position? No one will question the power of the supreme court of a state to be inconsistent in its construction of the provisions of the state constitution.

Where such inconsistency exists, and this court is required to pass upon the constitutionality of the statute of said state, it will surely adopt that holding of the state court which is in harmony with its own construction of similar statutes and constitutional provisions instead of that which is opposed thereto. If the construction of the due process clause of the Nebraska constitution, in the instant cases and those of like import, is in conflict with that adopted in the Baty case, then this court must adopt one of said constructions, or must exercise its own independent judgment as to the proper construction to be placed thereon. In either case, it is inconceivable that this court would follow the decision in the Baty case, when it is directly opposed to the construction which it has placed upon the due process clause of the federal constitution, and disapprove of and reject the decisions of the state court which are in harmony therewith.

Counsel insist that the reason given by the state court for declaring that the act in question and similar cases are not unconstitutional, under the principle announced in the Baty case, is that the recoveries provided for are liquidated damages, not penalties, and that this court is bound by such holding. It is an elementary rule that a correct decision will not be reversed or set aside because a wrong reason is given therefor. Under this rule, the correct determination, that the recovery provided for does not violate the constitution, would not be affected by its erroneous holding that such recovery is not penal in its nature, if such holding had been made or such reason for the decision given. But the court did not so hold. On the contrary, the state court, in the cases heretofore cited herein, expressly recognizes the

penal, or quasi penal, character of statutes providing for the recovery of a fixed amount of damages for the failure to perform a statutory duty; and said court has uniformly upheld said statutes, notwithstanding the penal character of the recovery provided for, in a suit by a private individual.

An examination and analysis of the Nebraska cases cited in this brief and that of the company herein, will show that there is no irreconcilable conflict between them. The distinction between the two lines of cases cited is plainly marked and easily understood. By the laws held to be unconstitutional, in the cases cited by counsel, the court or jury was required to first determine, from the evidence, the actual compensatory damages sustained by the plaintiff, and was then permitted to add such a sum as it saw fit, or required to double said actual damages, as a fine for the punishment of the defendant. While by the statutes held to be constitutional, in the cases cited by us, neither the court or jury is required to determine the actual damages from evidence adduced, nor is either required or permitted to add anything thereto, but the statute itself fixes the amount of recovery by a party injured by the failure of the defendant to perform a duty imposed upon him by the statute. This is the distinction drawn by the Nebraska supreme court, as is shown by the following excerpt from its opinion in *G. I. & W. R. R. Co.* v. *Swinbank,* 51 Neb. 526, a case involving a statute allowing double damages:

> "The so-called penal statute discussed in *Graham* v. *Kibble, supra,* was sustained as being a provision for liquidated damages. It related to a case where the actual damages are difficult, if not impossible, of ascertainment; whereas the statute we are con-

sidering requires the actual damages to be admeasured, and then arbitrarily requires the defendant to pay the plaintiff twice that sum."

In *Graham* v. *Kibble*, above referred to, the court said:

"It may be true that such statutory allowance is much in excess of the actual loss sustained or injury done, and therefore, to the extent that it is so in its effect upon the offending officer, is in the nature of a penalty. But the power of the legislature to fix the maximum, or even the exact amount recoverable by a private person sustaining injury, or that shall accrue to the public in case of official delinquency, cannot be successfully questioned."

It will thus be seen that the following rules of law are firmly established and enforced by the supreme court of Nebraska, to-wit:

1. Any law which requires actual compensatory damages to be ascertained from the evidence, and then requires the same to be doubled, or permits a further sum to be added thereto, as a punishment for the defendant, is unconstitutional and void.

2. When the damages which may result from the failure to perform a duty imposed by statute are difficult of ascertainment, the amount recoverable by a private person sustaining injury from said breach of duty may be fixed by the legislature, and such statute, although penal, or quasi penal, in its nature, does not conflict with any constitutional inhibition and will be sustained.

The statute under consideration in the cases at bar is within provisions of the second rule and has been declared so to be by the court.

The distinction thus drawn between the laws passed upon in the two lines of cases cited, may not appear to

this court to be sufficient to justify the state court in holding the former unconstitutional and sustaining the latter. But it must be remembered that the final determination of whether a state statute conflicts with a state constitution belongs to the court of last resort of that state. Its method of reasoning, or the principles and rules applied in reaching its conclusion may, or may not, be sound, yet its decision is none the less final. But if this court had the right, or should assume the power, to review the action of the Nebraska court in establishing the above rules, and in holding the laws coming under one void, and those coming under the other valid, and should undertake to make the same conform to the principles of constitutional construction established by its former decisions, it is clear that it is rule one, and the decisions in the Baty and kindred cases, which would have to be disapproved and overruled, as they are in direct conflict therewith. It is equally apparent that, in such event, the second rule, and the decisions thereunder, including those in the instant cases, would be approved and affirmed, as they are in harmony with said former decisions of this court.

Counsels' argument is based wholly on the false statement and assumption that, according to the decisions of the supreme court of Nebraska, any law which provides for the recovery, by a private individual, of a penal or quasi penal sum, is in conflict with the state constitution. The foregoing examination and analysis of said decisions show conclusively that said assumed premises are false, and it follows that the conclusions drawn therefrom are also wrong. There is, therefore, nothing in the decisions of the supreme court of Nebraska which prevents this court from finding that the statute in ques-

tion is a police regulation, penal or quasi penal, in its nature, and holding, in conformity with its former decisions in like cases, that the same is not in conflict with the 14th Amendment. But even if it were true that this court is bound, by the decisions of the state court, to consider the amount of recovery provided for by said statute as liquidated damages and not penal in its nature, it does not follow that the same in any manner conflicts said amendment, for

IV.

A STATE LEGISLATURE HAS THE POWER TO FIX, BY STATUTE, THE MAXIMUM, OR EVEN THE EXACT AMOUNT RECOVERABLE BY A PERSON SUSTAINING INJURY FROM THE DELINQUENCY OF A PUBLIC, OR QUASI PUBLIC, AGENT; AND SUCH A STATUTE DOES NOT VIOLATE ANY OF THE PROVISIONS OF THE 14TH AMENDMENT.

An able law writer, after referring to the great diversity of verdicts in suits for damages, owing to the passion, prejudice and many frailties of human nature, says:

> "This has been the prolific source of embarrassment, and uncertainty and suggests the importance of statutory enactments on the subject. A uniform measure of damages under the same substantial state of facts is desirable, even though the rule therefor be arbitrary." *Field's Law of Damages*, Sec. 17.

In *Graham* v. *Kibble, supra,* the court said:

> "It may be true that such statutory allowance is much in excess of the actual loss sustained or injury done, and therefore, to the extent that it is so in its effect upon the offending officer, is in the nature of a penalty. But the power of the legislature to

> fix the maximum, or even the exact amount recoverable by a private person sustaining injury, or that shall accrue to the public in case of official delinquency, cannot be successfully questioned."

And in the opinion in the Cram case, transcript of record herein, page 83, it is said:

> "Although the legislature may not prohibit the carrier from transacting business, yet it may regulate the affairs of that public servant, and much of the reason for sustaining the power of the legislature to provide that public officers shall pay a definite sum as liquidated damages for acts of commission or omission, applies to like provisions in statutes passed to regulate public carriers in the transaction of their business."

The foregoing is in harmony with the decisions of all state courts upon the proposition, so far as our painstaking research has extended, some of which decisions we shall hereafter refer to in this brief. But fortunately we do not have to rely on the authority of the state courts alone to support our position, for this court has itself, in analagous cases, determined the question under consideration in the same way as the state courts have done, as we shall proceed to show.

The legislatures of a large number of the states of the union have enacted statutes which provide that when real property, insured against loss by fire, is wholly destroyed thereby, without fault of the insured, the amount of the insurance written in the policy shall be the measure of damages for said loss.

It is clearly apparent that the constitutional principles involved in the question of the legislative power to enact such statutes, fixing the amount of recovery on an insurance contract, are the same as those which must govern in determining the question under consideration.

While an insurance company is not a public service corporation to the same extent as a railroad company, yet it is engaged in a business which vitally affects public interests, and the courts all hold that it is subject to reasonable police or governmental regulation and control by the legislature, and that this includes the right to fix the amount of recovery by a party insured who sustains loss under the conditions named in the statute.

Every constitutional objection to the damages provided for by the statute involved in the cases at bar, so strenuously urged by counsel, applies with equal or greater force to the damages fixed by the said insurance statutes. Counsels' contention that the Nebraska statute conflicts with the 14th Amendment in that it takes the property of the company without due process of law, and denies it the equal protection of the law, is based upon the claim that the determination of the amount of damages sustained by a party injured is a judicial function, which cannot be exercised by the legislature; that the recovery provided for may exceed the actual loss, and, to that extent, it gives the property of the company to others without due process of law; and that the statute applies to one class of corporations only, and therefore denies it the protection of the law which is given to those persons and corporations not affected by its provisions. Is this contention or argument any more sound, forceful or potent in the instant cases than it was when urged and used in regard to said insurance statutes?

It is an elementary principle of law that a fire insurance policy is a contract of indemnity whereby the insurer agrees to pay to the insured the actual loss or damages which he may sustain by fire to the insured

property, not exceeding the amount of insurance expressed in the policy. If an insured building was worth only $500.00 at the time of its total destruction by fire, it is plain that the actual loss or damage which the assured sustained thereby is no more than that sum. Yet, if the amount expressed in the policy is $1,000.00, the provisions of said statutes compel the insurer to pay that sum, or $500.00 more than the actual damages sustained. And this is true although the written contract expressly provides that the insurer shall not be obligated to pay more than the actual value of the property at the time of the loss. Why is this not the taking of $500.00 of the insurer's property and giving it to the insured, as much as it would be to permit a shipper to recover the amount provided by the statute in question, even if said recovery should exceed the actual damages sustained? Is it not as much an exercise of judicial functions by the legislature to provide by statute that the insured shall pay the full amount expressed in the policy without regard to the amount of his actual loss or damages, as it is for the statute to require a railroad company to pay a fixed sum to a party injured by its failure to comply with a duty required by the statute? In either case, the damages are liquidated, the actual damages are conclusively presumed to be the amount so fixed, and the defendant is estopped to deny that the plaintiff has been damaged to that amount. Again, is the selection of railroad corporations as the only class to which the statute in question shall apply any more a denial of the equal protection of the law, than the selection of insurance corporations as the only class compelled by statute to pay liquidated damages?

Cases involving the construction and enforcement of said insurance statutes have been decided in the supreme courts of at least twelve states and never, so far as we have been able to learn, has such a statute been held to be in conflict with the provisions of the constitution of the United States or of that of any one of the states of the Union. In several of said cases, it is expressly held that the provisions of said statutes in regard to the amount of the recovery amount to a statutory liquidation of damages, which become a part of the contract, and must govern notwithstanding any conflicting provisions embodied therein by the parties.

In *Lancashire Inv. Co.* v. *Bush,* 60 Neb. 121, it is said:

> "The statute, which is to be regarded as part of the contract, fixes conclusively the worth of the building which is the subject of insurance. If the property is wholly destroyed, its actual value is not to be determined by evidence, agreement or arbitration. The damages are liquidated and the measure of recovery already ascertained."

To the same effect, see *Oshkosh Gas Light Co.* v. *Ins. Co.,* 71 Wis. 454, and *Havens* v. *Ins. Co.,* 123 Mo. 403.

In *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, this court definitely determined that such a state statute does not conflict with any of the provisions of the 14th Amendment. That was an action begun, in a court of Missouri, on a policy of insurance issued by the plaintiff in error. The policy insured the defendant in error against loss or damage by fire to a certain barn, in a sum not to exceed $800.00. Said barn was wholly destroyed by fire, and the action was to compel the payment of the said sum of $800.00. The policy contained a clause limiting the company's liability "in case of loss to the actual

cash value of the property at the time of loss," and this stipulation was pleaded by the company together with an averment that, at the time of the burning of said barn, it was not worth to exceed $100.00. The company also pleaded that the statute of Missouri, which fixed the measure of damages to be paid by a fire insurance company, in case of the total destruction of the insured property by fire, at the amount for which the property was insured, is contrary to several specified provisions of the constitution of Missouri, to the constitution of the United States and particularly to the provisions of the 14th Amendment thereof. The trial court sustained a demurrer to the answer of the company, and rendered a judgment on the pleadings for the full amount prayed for. The supreme court of Missouri affirmed said judgment, and the case then came to this court upon petition in error.

Counsel for the insurance company contended that the Missouri statute violated the 14th Amendment in three particulars, viz: (1)That it abridges the privileges or immunities of citizens of the United States; (2) denies to persons within its jurisdiction the equal protection of the laws; and (3) deprives persons of property without due process of law.

The first one of said propositions,—which has no reference to the questions involved in the cases at bar,—was disposed of by referring to the fact that a corporation is not a citizen, and has not the privileges and immunities secured to citizens against state legislation.

The reason urged in support of the second proposition is that said statute discriminates between fire insurance corporations or companies and those engaged in other kinds of insurance. This is the same objection which is

interposed and the same argument offered against the validity of the Nebraska act in question herein.

This court, after referring to its former holding that "the state may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion"; and stating that "classification for such purpose is not invalid because not depending on scientific or marked differences in things or persons or in their relations, it suffices if it is practical, and is not reviewable unless, palpably arbitrary",—held that the Missouri statute is not subject to the objection that it denied the company equal protection of the laws. In discussing this question, *Railway Co.* v. *Mackey*, 127 U. S. 204, 208, and *Minneapolis & St. L. Ry.* v. *Beckwith*, 129 U. S. 26,—in which state statutes, making a class of railroad corporations for special legislation, were sustained,—were held to be analogous to the one under consideration.

The opinion of the court in said case, including the cases cited therein in support thereof, so completely settles counsels' objection, that the Nebraska statute denies the railroad equal protection of the law, adversely to them, that it is unnecessary to further consider it.

The third proposition urged in the Daggs case is the same as that on which counsel in the cases at bar place their principal reliance, to-wit, that the statute deprives the company of property without due process of law. It was insisted in that case, as it is herein, that the statute precludes judicial inquiry as to the actual damages sustained. In other words, that it is an attempted exercise by the legislature of judicial functions. This is shown by the following quotation from the opinion, by Mr. Justice McKenna, therein, to-wit:

> "The specific objections which, it is claimed, bring the statute within the prohibition of the constitution, in the last analysis, may be reduced to the following: That the statute takes away a fundamental right and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact."

After careful consideration, this court held that said statute does not conflict with any provision of the 14th Amendment, and affirmed the decision of the supreme court of Missouri sustaining the statute.

As the constitutional guaranties of due process and equal protection of law can have no greater force or effect when invoked by a railroad company than when claimed by an insurance corporation, the determination of the questions involved in the Daggs case is decisive of the same propositions in the cases at bar.

Said case was cited with approval in *Fidelity Mut. Assn.* v. *Mettler,* 185 U. S. 226, in which a statute of Texas, compelling insurance companies that make default in the payment of a loss covered by one of their policies to pay twelve per cent damages, together with reasonable attorney's fees, was upheld.

Other statutes of a similar nature, in which the minimum or exact amount of recovery is fixed, have been considered and enforced by the federal and state courts.

Section 4966, of the Revised Statutes of the United States, is as follows:

> "Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subse-

quent performance, as to the court shall appear just."

In *Brady* v. *Daly*, 175 U. S. 148, said statute was construed and enforced as providing for liquidated damages. In the opinion, after reviewing the several statutes which had been passed upon the subject, it is said:

"These statutes, it will be perceived, all use the word 'damages' when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor the right to recover the damages which he has sustained therefrom."

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. * * *

The whole recovery is given to the proprietor, and the statute does not provide for the recovery by other person in case the proprietor himself neglects to sue. It has nothing in the nature of a *qui tam* action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture."

The court then cites many decisions in which similar statutes have been held to be remedial and giving compensatory damages, not penal for the purpose of punishment, and then says:

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think

> it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

The question passed upon in said case is exactly the same as that under consideration in the case at bar. The fact that such statute made only a minimum limit does not affect the principle involved. The argument offered by counsel herein against the statute of 1905 is equally applicable to the Daly case.

Chapter 105 of U. S. Stat. at Large, provides that any person, other than the owner of a patent for a design, who, without license or right, applies said design to any article for the purpose of sale "shall be liable in the amount of two hundred and fifty dollars", and for the excess of profit above that amount to be recovered "by an action at law, or upon a bill in equity for an injunction to restrain such infringement." This statute has been repeatedly enforced in the federal courts. *Pirkle* v. *Smith,* 42 Fed. 410, was an action in equity, brought under said statute, to restrain further infringement of a patent and to recover the $250.00 damages fixed thereby for such infringement. In the opinion, by Judge Wheeler, it is said:

> "The statute seems to be intended to carry out the idea that the amount of the liability is merely a fixed measure of profits which may be decreed in equity as an incident to the jurisdiction for relief by injunction in the same behalf. *Root* v. *Railway Co.,* 105 U. S. 189. As the orator claims no profits beyond the $250 given by the law, there is no question about the amount, and no occasion to send the case to a master. A decree for the orator for that amount of

> profits as an incident to a decree for an injunction appears to be required by that statute, as the case stands."

Section 2121, of the Revised Statutes of Missouri, fixing the amount of recovery at $5,000.00 for the negligent killing of a person by a railroad company, was upheld by the supreme court of Missouri in *Coover* v. *Walker*, 31 Mo. 574, and *Carroll* v. *M. P. Ry. Co.*, 88 Mo. 239. In the latter case the statute was attacked on the ground that it conflicts with the provisions of the 14th Amendment, and for several other reasons; but the court held that there was no such conflict and pronounced the statute constitutional and valid. See also *Miller* v. *M. P. Ry. Co.*, 109 Mo. 350, where the same statute was involved and enforced.

A similar statute was upheld and enforced in Connecticut. Said statute provided that, when a passenger is killed by the negligence of a railroad company, said company shall pay damages not exceeding $5,000.00 and not less than $1,000.00. In *Lamphear* v. *Buckingham*, 33 Conn. 238, the court held that on default of the company, the plaintiff was entitled to $1,000.00, the minimum damages provided for by the statute, without proof. In its opinion the court said:

> "If the damages had been fixed by the statute at a single sum of $1,000 or $5,000, no hearing in damages would have been necessary or proper. No evidence which the defendant could properly offer, and no fact which the court could properly find, would affect the right of the plaintiff to recover that sum. And this is true whether the statute be regarded as giving a new right of action or regulating the amount of damages and their disposition on an old one."

Article 4496, of the Revised Statutes of Texas, provides that a railroad corporation, which refuses to transport property at the regular appointed time shall pay to the aggrieved party actual damages of 5 per cent per month, upon the value of the property at the time of shipment, for the negligent detention thereof beyond the term reasonably necessary for its transportation. In *Texas. Cent. R. Co.* v. *Hannoy & Co.* (Tex.) 130 S. W. 250, the court held that said statute did not violate the provisions of the 14th Amendment, nor of the constitution of Texas.

The statute of California,—1883, page 300,—provides that whenever a board of supervisors shall, without authority of law, order any money paid as salary or fees, and such money shall have been actually paid, it may be recovered back in a suit in the name of the county against the person to whom it was paid, together with twenty per cent damages for the use thereof. The constitutionality of this statute was attacked in *Orange County* v. *Harris,* 97 Cal. 600, but the court held it valid. In the opinion in said case the court said:

> "There is no merit in the contention that the provision for 20 per cent, damages, if enforced, is unconstitutional, because it deprives a defendant of property without due process of law. It is no more obnoxious to such a criticism than the provisions of the Code relating to costs and damages in cases of delinquent taxes."

Counsel for the company have not cited, and our extended research has failed to disclose, a single case wherein the fixing by statute of the maximum, minimum, or exact amount of recovery of a party injured by the failure of a public, or quasi public, agent to perform a duty required by the statute, was held to conflict with the provisions of the 14th Amendment.

In *Downey* v. *Northern P. R. Co.*, 125 N. W. 475,—which is erroneously cited, in counsels' brief, as *"Douglas"* v. *Northern P. R. Co.*—the supreme court of North Dakota held a statute of that state, similar in its nature, but different in some of its requirements, to the Nebraska statute under consideration, to be unconstitutional "as an unreasonable exercise of the police power of the state." This holding was based wholly upon the unreasonableness of the service required, and no question of the right of the legislature to fix the amount of recovery in case of a violation of the statute was raised or passed upon. The Dakota statute was construed as making the company liable for a failure to transport stock at a speed of twenty miles per hour regardless of the causes for delay and therefore unreasonable. The statute involved in the instant cases, as construed by the supreme court of Nebraska, does not render the company liable for delay caused by the act of God or causes over which it has no control. As thus construed, there is absolutely nothing in the record herein which shows that the service required by said statute is unreasonable, and the Downey case has, therefore, no bearing upon any of the questions to be determined herein.

The distinction between the other cases cited in counsels' brief, on this point, and those like the ones at bar, is too obvious to require extended consideration. In the former, the property of a private individual was taken, without any act, or consent, expressed or implied, on his part, not because he had failed to comply with any statutory duty or requirement, but simply because it was needed for a public use. In such a case the courts hold that an attempt by congress, or the legislature, to fix the amount or compensation which he shall receive

for such a taking violates the constitutional provision that private property shall not be taken for public use, without just compensation. In the cases at bar, and in those cited by us in their support, an individual or a corporation voluntarily engaged in an occupation or business affecting the public interest or welfare. By so doing, it becomes a public or quasi public corporation, and its business, and the property employed therein, subject to any reasonable regulation and control. The legislature had power to provide, by statute, in what manner such business shall be conducted, subject only to the limitation that such statutory requirements shall be reasonable; and such provisions enter into and become a part of every contract, either express or implied, which is made in relation to such public or quasi public business. This is clearly illustrated by the cases sustaining statutes providing for the payment of liquidated damages by insurance companies. In *Daggs* v. *Orient Ins Co.*, 136 Mo. 382,—subsequently affirmed by this court,— it is said that such statutes "must be held, according to the great weight of authority, to enter into and form a part of the contract of insurance as fully as if written into it." The compliance with such statute is one of the conditions under which the corporation is authorized to do business in the state. This court has repeatedly held that statutes prescribing the conditions under which corporations shall conduct their business in the future are not inimical to constitutional provisions. In *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S., 204, it is said:

> "It cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legisla-

tion to this effect is found in the statute books of every state."

After quoting the foregoing excerpt from the Mackey case, Mr. Justice McKenna, in *Orient Ins. Co.* v. *Daggs, supra,* said:

> "That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. * * * The power of a state to impose conditions upon foreign corporations is fully explained in *Hooper* v. *California,* 155 U. S. 648, and need not be repeated."

The foregoing applies with equal force to the propositions involved in the instant case. The statute in question was enacted before the occurrence of the transactions herein complained of. The provisions of said statute, including the amount of damages to be paid for its violation, constitute some of the liabilities prescribed under which said railroad corporation was authorized to conduct its business in the state, and became as much a part of said company's contract to ship the stock in question as if written therein; and, as the record fails to show that said regulations and conditions are unreasonable, the statute does not conflict with any constitutional inhibitions.

The contention that, if the right of the legislature to fix liquidated damages to be paid by the railroad company is established, there is no limit to the amount which it may fix, is wholly without merit, for such statutory regulation, or liability, imposed upon a public service corporation, is always subject to the scrutiny of the courts, and whenever it is shown to be unreasonable or oppressive it will be declared void.

The rule prevailing in Nebraska is that a provision for liquidated damages, in a contract or statute, will be

upheld in cases where the actual damages are impossible or difficult of exact ascertainment. Said rule, as applied to contracts, obtains in nearly all jurisdictions, including that of this court. *Sun Printing Co.* v. *Moore,* 183 U. S., 642. In said case, Mr. Justice White said:

> "The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not *bona fide,* in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement."

This court also held, in said case, that the enforcement of a provision for liquidated damages is not always limited to cases where the damages are uncertain, or difficult of ascertainment.

It will thus be seen that this court has not denied the soundness of the rule in force in Nebraska, as intimated in counsel's brief, but has affirmed and broadened it.

In chapter IV of their brief, counsel assert that, if the soundness of the rule, as applied to statutes, be assumed, the court erred in applying it to the instant cases. This assertion is based upon their claim that the damages to the owner of stock, from delay in their shipment, are not uncertain nor difficult of exact ascertainment; that this question is of general and not special or local law, and this court is not barred by the holding of the state court, but should exercise its independent judgment thereon. If this be true, does it not necessarily follow that it should apply its own broader rule, in regard to when a provision for liquidated damages will be enforced, laid down in *Sun Ptg. Co.* v. *Moore, supra?* It is only by the application of this broader rule to liquidated damages fixed by statute, that the decision in *Orient*

Ins. Co. v. *Daggs, supra,* can be sustained, for it will not be contended that the value of the building, at the time it was burned, was impossible or difficult of ascertainment, and that would, of course, be the actual damages sustained, and was the damages expressly agreed upon in the policy.

But we insist that the damages sustained by the owners of live stock, resulting from delay in shipment, are uncertain and difficult of ascertainment; and that the court did not err in holding that the instant cases are within said rule as limited in Nebraska. In the opinion in the Cram case, Trans. 82, it is said:

> "It is a matter of common knowledge that live stock confined in a freight car deteriorates in condition and that, if the animals are to be placed on the market within a short time of the termination of transportation, the depreciation is not confined to a shrinkage in weight, but to many other factors difficult to prove, but actually existing and seriously affecting the market value of said property. As the damages accruing from the protracted confinement of stock is difficult to prove with reasonable exactitude and yet always exists, the legislature has the power to provide for liquidated damages. Such legislation is not unsound in principle and has been upheld in many courts."

It is manifestly apparent that it is impossible to *accurately* determine the quantum of damages to live stock caused by confinement in freight cars during delay in shipment. Many elements and factors may contribute to the injury which furnish no means for accurate mathematical computation of the resulting damages. An approximation thereto is all that it is possible to reach. The damage from loss of a sale of the stock, or a fall in the market, may, perhaps, be accurately ascertained. But

by what finite means can it be accurately determined the number of pounds additional shrinkage; or what difference in the grading of fat stock for the market; or the lowered vitality, loss of vigor or constitutional impairment of feeders, horses or mules, and consequent reduction in price or value, is caused by delay in shipment? But whatever may be held as to the *possibility* of accurate ascertainment of the actual damages sustained in such cases, it is clearly manifest that such ascertainment would be, to say the least, *difficult*. This places the instant case in the class governed by the rule above referred to.

V.

ISSUES, REFERRED TO IN BRIEF OF PLAINTIFF IN ERROR, WHICH ARE NOT PRESENTED BY THE RECORD.

Counsel argue that, in certain hypothetical cases suggested by them, the recovery provided for by the statute in question would be less than the actual damages sustained by the shipper, in violation of his constitutional rights. It is not necessary for us to discuss the merits of this proposition, nor for the court to consider or determine the same in the cases at bar, for the reason that, if true, it would benefit, instead of injuring, the plaintiff in error, and it is the settled law of this court that an alleged unconstitutional feature of a law will be considered and passed upon only when raised by a party injured thereby. The rule is thus stated, by Mr. Justice Day, in *Southern Ry. Co.* v. *King*, 217 U. S. 534:

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom

the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Tyler* v. *The Judges*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Hooker* v. *Burr*, 194 U. S. 415; *Hatch* v. *Reardon*, 204 U. S. 152, 160."

If it be true that the statute in question limits the shippers' damages to a less amount than the actual damages sustained, then said shippers constitute the only class that could be injured thereby. The only members of said class, who are parties to this action, are not attacking the statute, as an infringement of their constitutional rights, but are insisting on its being enforced according to its terms. As no party to the record, that could be injured by said alleged unconstitutional feature of the law, has raised the question, the same is not at issue herein and is excluded from the consideration of the court by the foregoing rule.

In chapter VII of their brief, counsel have referred to the allegation in the company's answer, that the speed regulation is unreasonable and imposes an undue burden because not possible to be complied with in practical railroad operation. They then concede that no proof was adduced in support of said allegations and that no issue is presented to this court thereon.

We find no fault with the foregoing statements and admissions; but we do most strenuously object to, and earnestly protest against, the balance of said chapter, in which counsel undertake to supply the evidence which they admit is not in the record, by their own assertions, as to the reasonableness of the statute, and as to what some undisclosed person has "said" in regard to the inability of some undisclosed railroad company to comply with

its terms, and to the amount of liability which it has incurred because of its failure to do so. The only possible object in making such unwarranted assertions, in regard to an issue not presented to this court, is to influence and prejudice the court in its consideration of the questions properly raised by the record; and the fact that the court should, and undoubtedly will, entirely disregard said statements furnishes no excuse for the impropriety of introducing them into counsels' brief.

VI.

CONCLUSION.

In conclusion, we submit that, by a proper application of the principles and rules of statutory and constitutional construction, heretofore announced and approved by this court, to the questions presented by the record herein, the correctness of the following propositions is established, to-wit:

1. The exercise of judicial functions by the legislature of a state is not a violation of any provision of the constitution of the United States; and the alleged fact that section 2 of the act in question constitutes an invasion, by the legislature, of the judicial department of government, and an attempt by it to exercise functions belonging to the judiciary alone, raises no federal question reviewable by this court. As said alleged fact constitutes the sole basis for alleged errors herein, the petition in error should be dismissed.

2. Whether the act in question is, in its scope and effect, a police regulation will be determined by this court from its own independent investigation; and as its object is manifestly the regulation of quasi public corpora-

tions, in the conduct of their business as common carriers, its provisions are clearly within the police power of the state.

3. There is nothing in the record to show that the requirements of said act are unreasonable or difficult to perform. This is conceded by counsel in their brief.

4. The supreme court of Nebraska has never held that all statutes which permit a private person to maintain an action for the recovery of a penalty are in conflict with the constitution of that state. On the contrary, said court has uniformly upheld the constitutionality of statutes fixing the amount of recovery by a private individual for injury sustained from the violation of a statutory requirement, and in so doing have expressly recognized the penal, or quasi penal, nature of said statutes. The only exception to the uniformity of such holding,—if the same may be said to be an exception,—is its refusal to uphold a statute or law which requires a jury to first determine from the evidence the amount of all actual damages sustained, and then permits the same to be doubled, or such a sum as the jury sees fit to be added thereto, as punishment for the defendant. The act in question comes within the uniform rule, and not the exception thereto above stated. There is therefore nothing in the decisions of the state court to prevent this court from sustaining said recovery as a penalty, if it should determine that it is penal in its nature, as it has repeatedly done under similar circumstances.

5. A state legislature has the power to fix, by statute, the maximum, or even exact, amount recoverable by a person sustaining injury from the delinquency of a pub-

lic, or quasi public, agent; and such recovery, although termed liquidated damages in the statute, does not violate any of the provisions of the constitution of the United States.

6. The judgment of the supreme court of Nebraska, in each of the instant cases, is right and should be affirmed.

All of which is respectfully submitted.

E. J. CLEMENTS and S. H. COWAN,
Counsel for Defendants in Error.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 193

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

WILBUR I. CRAM.

No. 194

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

JAMES M. KYLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JOHN F. STOUT,
HALLECK F. ROSE,
Counsel for Plaintiff in Error.

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I.

Appellees' Statement embodies unfounded aspersions.

The suggestions in the statement of defendants in error, pp. 3, 4, that the statutory speed is slower than the published schedules of the railroads affected, that

the questioning of the validity of the statute is a presumptious exhibition of disrespect of the rights of the public and evidences a disposition to persist in inexcusable violations of law, and that the cases are brought here oppressively in order to burden defendants in error with expenses in excess of the amount in controversy and to deter others from enforcing just demands, are highly dramatic. But the court will be unable to derive from all these dramatics any assistance in the solution of the grave constitutional question presented by the records, since the assumed facts are not true and have no foundation in the records.

II.

It is not contended that the 14th amendment prohibits the states from assigning judicial powers to their legislative assemblies.

It is maintained, however, that judicial power can only be exercised, by any department of the state government, in conformity to the requirement of due process.

The main brief of plaintiff in error, p. 41, at the threshold of the argument, expressly concedes that the Fourteenth Amendment does not restrain the states from assigning judicial powers to their legislative assemblies; and that, as a matter of history, there are instances in which judicial powers have been so conferred upon legislative bodies. In presuming to reduce the argument of plaintiff in error to the final proposition that the states are restrained by the due-process clause from assigning any judicial powers or functions to their legislative bodies, counsel for defendants in error have missed the point at issue.

It is submitted that the function of determining the

amount of damages accruing to Cram and Kyle, from delays in transporting their animals, is judicial, whether performed by the legislature or the court. In either case the exercise of that function is subject to the constitutional requirement of due process. That requirement operates upon all departments of the state. *(Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 233-236.)

The circumstance that the Nebraska Constitution withholds all judicial powers and functions from its legislative department, merely emphasizes the fact that the holding of its highest court was that liquidation of damages was purely a political and legislative function appropriate to be determined by popular vote or a legislative act. If, in the opinion of the state court, the function had been judicial, the act questioned must necessarily have been adjudged void, since that court could not have overlooked the provision of the state constitution which withholds all judicial power from the legislature, to which its attention was drawn in argument.

If, as in judicial proceedings before the British House of Lords, the legislature had taken cognizance of a pending controversy by due process, and determined a specific issue between adverse parties after a fair opportunity to each party to be heard, there would then, perhaps, be no violation of the due process clause, even though the state constitution had been disregarded. But the present issue involves the power of the legislature to determine the amount of recovery, between private suitors, by liquidating damages by legislative act, in advance of the occurrence, and without any pretense of notice or opportunity for a hearing. If that function is judicial it is obvious that it was not exercised in conformity to the requirement of due process.

III.

Obviously the state court did not rest its decision either on the proposition that the state legislature could exercise judicial power, or that the imposition complained of is penal.

The suggestion that the judgments ought to be affirmed if this court holds the function of fixing the amount of damages, accomplished by legislative act, to be judicial, is a satire. Counsel for plaintiff in error urged before the state court that, construed as liquidated damages for redress of a civil wrong, the act is an exercise of judicial functions, contrary to the express provisions of the state constitution which in terms forbids the exercise of such power by the legislature. Had the premise been admitted, the conclusion could not have been avoided. So, before the state court, counsel for defendants in error urged, on the authorities which he now cites to the point that the imposition is penal, that the function of fixing measured damages is legislative and not judicial. So, also, the state court in its opinion answered the argument based on the assumption that such function is judicial by an unequivocal holding that "the legislature may provide by general law that a shipper of live stock may recover *liquidated damages*" etc. (Point 3 of syllabus prepared by the court; printed record, p. 79.) The court in its opinion said:

"Such legislaion is not unsound in principle and has been upheld in many courts. (Printed Record, p. 82.) * * * On more than one occasion we have upheld the right of the legislature to *liquidate damages,*" etc. (p. 83.)

The cases cited (p. 83) in which the court had held *liquidation of damages* to be a legislative function are *Graham v. Kibble*, 9 Neb. 182, *Clearwater Bank*

v. Kurkonski, 45 Neb. 1, and *Hiers v. Hutchins*, 58 Neb. 334—the identical line of cases which counsel here assert commit the state court to the contrary doctrine of punitive recoveries in favor of private suitors. It seems necessary for this court, however, to accept the avowed interpretation of the state court, that punitive recoveries are forbidden in all cases, instead of the antithesis thereof suggested by counsel.

That the brief of defendants in error disavows the doctrines which were successfully urged upon and held by the state court, is shown by points 1 and 3 of the syllabus prepared by the court (printed record, pp. 78, 79) as follows:

"1. Sections 10606 and 10607, Cobbey's Annotated Statutes, 1907, being chapter 107, Laws of Nebraska, 1905, do not contravene sections 11 or 15 of article 3 of the constitution of Nebraska, nor is said legislation repugnant to the fourteenth amendment to the constitution of the United States."

"3. The legislature may provide by general law that a shipper of live stock may recover *liquidated damages* from a public carrier for failure to transport such stock committed to the carrier for transit between stations in Nebraska."

It is manifest, on the face of the record, that counsel for defendant in error, in order to save the act from the condemnation of the state constitution, successfully urged before the state court a construction that was repugnant to the National Constitution. Before this court he is urging, in order to save the act from the condemnation of the federal constitution, a construction that is repugnant to the state constitution. Since the interpretation of the State Statute and the State Constitution held by the state court is the one by which its compatibility or repugnance to the federal consti-

tution must be tested, the cunning displayed in the shift of position is not likely to influence the judgment here.

IV.

If this court interprets the imposition on railroad companies in favor of shippers of livestock in car load lots of $10 per car for each hour of delay to be a punishment in the nature of a fine, as it did the Missouri Statute under consideration in MISSOURI R. CO. v. HUMES, 115 U. S. 512, it is then submitted that the statute, in that contingency, must be held repugnant to the guaranty of the fourteenth amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The equality clause of the 14th amendment is, obviously, a guaranty by the nation that the laws of all the states shall be uniform in operation and afford equal protection to all persons within their several jurisdictions. From its very nature this guaranty is not intended to protect any specific right or attribute of person or property defined by the federal constitution. *It is directed solely against discriminatory tendencies in the terms and operation of the laws of the states.* It is the mere fact of the discrimination *by the state,* in and of itself, that determines the repugnancy of a state law to this specific constitutional guaranty, as contra-distinguished from any disregard of due process or any other right of person or property created or defined by federal authority. Whether the terms or operation of a state law are repugnant to the requirement of uniformity, or equality, must necessarily depend upon what rights have been conferred or protection extended to persons generally by the constitution and laws of the particular state in which the question arises.

The nature of the guaranty under consideration

requires the issue of discrimination, or want of reciprocal privilege, to be tested by a consideration of the laws of the state. Were the privileges or rights freely given by the state to one suitor withheld from another? The equality clause is a guaranty of the uniform operation of the laws of the state, and a prohibition against unequal and discriminatory laws. As such it should receive a liberal construction to effectuate its great ends, in harmony with the rule adhered to by this court in the interpretation of the federal constitution from the time of CHIEF JUSTICE MARSHALL.

If the imposition of $10 per car for each hour of delay, made by the act in question, be held by this court to be a penalty, will the act, so construed, be repugnant to the equality clause of the 14th amendment? Testing the act, as we must, by the general rights conferred and the protection afforded by the constitution and laws of Nebraska to persons within its jurisdiction, the opinion of its court of last resort *now under review* demonstrates its repugnancy to this guaranty of the 14th amendment. That court (printed record p. 83) said:

"Council for defendant argue that the statute *purports to give more than compensatory damages*, and therefore is controlled by *Railroad Company v. Baty*, 6 Neb. 37; but that case merely disapproved a statute that purported to give *double* damages; and *if the act under consideration provided for the recovery of double or treble damages* (that is, if the imposition were penal in character) *we would not hesitate to apply the earlier case to the instant one.* Such is not the case."

The state court then proceeds to uphold the act as a legitimate exercise of the asserted right of the legislature to liquidate compensatory damages. The Nebraska court, in the language last quoted, flatly reasserts its original interpretation of the bill of rights,

by which the legislature and the courts are forbidden, as a universal principle, in all cases, to impose a penal forfeiture for the benefit of a private suitor. Its social system reserves all penal exactions to the state. The language quoted is a specific declaration that the plaintiff in error comes within the protection of this principle and that it precludes the legislature from imposing *penalties* against railroads for the benefit of stock shippers. The court in pronouncing the judgment under review has declared that it *would not hesitate* to pronounce such a *penal* imposition void. It is not necessary to here repeat the references to numerous judgments of the Nebraska Court showing the development and uniform adherence to the rule. They are cited and reviewed in the main brief of plaintiff in error at pages 28 to 38.

The rule stated is a constitutional restraint, self-imposed by the state, upon the manner in which it may exercise its police powers. It interprets and contrues the due process clause of the bill of rights of the *state constitution* into a guaranty that no person shall be subjected to a penal imposition by a private suitor. This rule does not operate as a surrender of the power to impose pecuniary forfeitures, but restricts their imposition to the use of the state, and requires them to be enforced exclusively by and in the name of the state. This court is concerned only to know that such is the law of the state, and is without concern as to the wisdom of its policy where no transgression of any restraint imposed by the federal constitution is involved.

The principle adopted in this instance, of guaranteeing all persons against penal impositions for the use of private suitors, is one over which the state has supreme and final authority. This principle is of the class which, when once adopted, is general and uni-

versal in its application and does not admit of exceptions. It is like the right to trial by jury, or to process, as a condition of being deprived of life, liberty or property, or the right to a remedy by due course of law for any injury to lands, goods, person or reputation, which cannot be chiseled or refined away by the device or expedient of classification. So long as this principle is recognized as a part of the fundamental law of the state and operates generally to protect the property of persons within its jurisdiction, a special act which imposes a penalty on railroads for the use and benefit of shippers of livestock in car load lots is repugnant to the guaranty of the 14th amendment that the laws of the state shall be of uniform operation and protect equally all persons within its jurisdiction.

It is submitted that this court can not justly deny or refuse recognition to the universality of the operation in Nebraska of the rule denying penal impositions for the use of private suitors, against the expressed declaration of the highest court of the state that it is beyond the reach of legislative power, by classification, to put the rule of *punitive* damages in force against railroads for the benefit of stock shippers. The supremacy of state authority to adopt and enforce the substantive rule of purely local law must be deferred to; and recognizing the rule, this court is then to determine whether the penal imposition of the statute, if it be so construed, is repugnant to the guaranty of the 14th amendment that the laws of the state shall be of uniform operation and equally protect all persons within its jurisdiction. The repugnancy is so plain as not to admit of candid disputation.

That the police powers of the states must be exercised in conformity to and in subordination of the equality clause of the Fourteenth Amendment is definitely settled by the judgments of this court.

(Connolly v. Union Sewer Pipe Co., 184 U. S. 558, 560; *Lawton v. Steele,* 152 U. S. 137.)

V.

The construction given to the statute by the State Court is conclusive in this proceeding.

An established rule of this court, doubtless based in part upon these considerations, should relieve the court from determining whether the act if interpreted according to its independent judgment and contrary to the interpretation of the state court, to be penal, is repugnant to the equality clause of the 14th amendment. That rule is to adopt the construction of the highest court of the state, whether right or wrong, and to test the constitutional validity of the statute by the interpretation actually put upon it by the state court.

The argument here presented illustrates the propriety and necessity of accepting the interpretation of the state court. That course permits the maintenance of the federal constitution without any interference by this court with the paramount authority of the state over questions of purely local law, and gives the suitor the benefit of all local rules by which judgment must have gone in its favor, but for the state court's denial of the federal right asserted. Perhaps the rule of adherence to the state court's interpretation is so firmly established as to make needless the argument above presented. (*Gatewood v. North Carolina,* 203 U. S. 531, 541 and cases cited at page 23 of the main brief of plaintiff in error); but the great importance of the main question at issue—whether legislative liquidation of damages conforms to the requirement of due process—seems to warrant the presentation of this aspect of the cas. We here quote the recent utter-

ances of this court establishing the rule which defendants in error have ventured to controvert.

"In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect, it reads out the provisions of section 7; and it is urged that it is the duty of this court to disregard the interpretation affixed by the state court, thereby bringing the statute within the prohibitions of the 14th Amendment. But it is elementary that under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view." *Gatewood v. North Carolina,* 203 U. S. 541, per the present Mr. CHIEF JUSTICE.

"It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes *is conclusive* here. We accept the construction given to a state statute by that court. * * * Nor is it material that the state court ascertains the meaning and scope of the statute, as well as its validity, by pursuing a different rule of construction from that we recognize. It may be that the views of the Kansas Court in respect to the matter are not in harmony with those expressed by us in *United States v. Reese,* 92 U. S. 214 (and other cases cited). We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the Chief Justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined." *Smiley v. Kansas,* 196 U. S. 455, per Mr. JUSTICE BREWER.

"As was said in *Osborn v. Florida,* this construction of a state statute by its highest court is not open to review." *Armour Packing Co. v. Lacy,* 200 U. S. 234, per Mr. CHIEF JUSTICE FULLER.

If the former decisions left any doubt as to the conclusiveness of the state court's interpretation of its own statutes, the question has been put to rest by numerous later rulings. Any other doctrine would be a reproach. The act in question would be void as repugnant to the state constitution if liquidation of damages were held to be a penal imposition. Were this court to hold the imposition penal, in conflict with the holding of the state court, the construction held by the state court would nevertheless be operative against plaintiff in error. The practical operation of the act is that which is given to it by the judgment of the state court. As an interpretation of a local law, that operation is, by force of the federal constitution, beyond the reach of this court. The rule adverted to is one of necessity arising out of the reservation to the states of supreme authority in matters of purely local concern.

From whatever angle the case is viewed the main question of whether the act is violative of the Fourteenth Amendment is thrown upon the court for decision. It is submitted that on the arguments presented in our main brief the judgment complained of should be reversed.

Respectfully submitted,
JOHN F. STOUT,
HALLECK F. ROSE,
Council for Plaintiff in Error.